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ACCOUNT.

1. Where there has been a settlement of accounts between partners, and a note given by one to the other for the balance found due, on an allegation of error, the former may go into an investigation of the accounts, and show that the note was given in error; but the settlement will be presumed to be correct, until the contrary is shown by the party alleging it. Receipted accounts embraced in such a settlement, will be admissible in evidence, subject to the right of the opposite party to show that they were erroneously allowed.

Green v. *Glasscock*, 119.

2. Where an account has been settled between the parties, and a balance struck, the account must be regarded as an entire thing, subject to proof of error; and the debit side cannot be given in evidence without the credit side. *Ib.*

ACT, AUTHENTIC.

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AGENCY.

1. Service of citation of appeal on an agent of an attorney-at-law representing an absentee, is insufficient. *Clark* v. *Delahoussaye*, 5.

2. An account rendered by a clerk or book-keeper of a merchant or trader, showing a balance to be due to the party to whom it was rendered, is not binding on his employers, without evidence of other authority than that usually conferred upon such an agent, who has no more power to state an account and acknowledge a balance as due by his employers, than he has to bind them by signing a note. To acknowledge a debt, the power must be express and special. C. C., 2966. *Spears* v. *Turpin*, 293.

3. The master of a vessel is authorised, under his general powers, to make a contract of affreightment, and the owner is bound to perform any lawful agreement he may enter into, relative to the usual employment of the vessel.

Bergerot v. *Farish*, 346.

4. Where a general power is confided to an agent, a party contracting with him will not be bound by any limitation which the principal may affix, at the time or afterwards, by distinct special instructions, unless knowledge of them be brought home to him. So, where a power of attorney has been revoked, the rights of one who has contracted with the agent, in ignorance of the revocation, will not be affected thereby. *Ib.*

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APPEAL.

I. *From what Judgments an Appeal will lie.*
II. *Appeal Bond.*
III. *Parties to Appeal, and Citation.*
IV. *Record of Appeal.*
V. *Answer of Appellee, and Matters urged for the first time after Appeal.*
VI. *Right of Appellee to prevent withdrawal of Appeal.*
VII. *Costs and Damages on Appeal.*

I. *From what Judgment an Appeal will lie.*

1. No appeal lies to the Supreme Court where the amount in dispute does not exceed three hundred dollars. The value of property seized by a sheriff to pay taxes, the sale of which was enjoined by plaintiff, cannot give jurisdiction, where the amount of taxes due is less than three hundred dollars.

Marsh v. *Briant*, 7.

2. No appeal will lie from a judgment, in an action by a wife for separation from

bed and board and of property, ordering the husband to pay alimony at the rate of ten dollars a month pending the suit, the amount not exceeding three hundred dollars, and commanding him to return to the matrimonial domicil.

Malony v. *Her Husband*, 116.

3. No appeal will lie to the Supreme Court from a judgment on a promissory note for three hundred dollars, which bore no interest, though interest was claimed in the petition from the maturity of the note, and allowed by the judgment from judicial demand. To authorise an appeal, it must appear that the matter in dispute exceeds three hundred dollars; and as no interest was due at the time of citation, the claim cannot be said to exceed that sum. Constitution, art. 4, sect. 2. C. P. 874. *Coons* v. *Threldkeld*, 153.

II. *Appeal Bond.*

4. Where the bond executed by an appellant is for a smaller amount than was required by the judge, the appeal will be dismissed. *Beasley* v. *Allen*, 39.

5. The appellee is not entitled to a dismissal of the appeal, where the bond is not equal to the amount required for a suspensive appeal, but, being for the amount fixed by the judge, is sufficient for a devolutive one.

Parks v. *Patten*, 167.

6. The insufficiency of the bond to entitle the party to a suspensive appeal, or the fact that it was allowed after the time had elapsed within which such an appeal could be granted, does not entitle the appellee to a dismissal of the appeal; but it will operate only as a devolutive one. C. P. 575.

Jones v. *Frellsen*, 185.

III. *Parties to Appeal, and Citation.*

7. To entitle a third person to appeal from a judgment between others, he must show that he is aggrieved by it. *Field* v. *Ewell*, 1.

8. A motion to dismiss an appeal on the ground of the want of citation, made at the third term after the record was filed, must prevail. *Hermann* v. *Rivers*, 2.

9. Service of citation of appeal on an agent of an attorney-at-law representing an absentee, is insufficient. *Clark* v. *Delahoussaye*, 5.

10. A suggestion of the death of the appellee before the commencement of the action, made by the appellant, will not be noticed, where the opposing counsel declares in open court, that he is authorized to appear for the representatives of the deceased, and waives the right to have them called upon to defend the cause. *Per Curiam:* The objection, to have weight, should have come from them. *Stafford* v. *Mead*, 142.

11. Where the record shows that all the parties interested are not before the court, and the questions asked to be decided were not acted on in the inferior court, they cannot be examined on appeal. *Bludworth* v. *Hunter*, 256.

IV. *Record of Appeal.*

12. Where a party wishes to show that a case was not regularly set for trial, nor the proper notice given, he must cause the rules of the court of the first in-

stance to be certified in the record, or it will be presumed that the case was regularly tried. *McAuliffe* v. *Déstréhan*, 468.

13. In every appeal the evidence on which the judge acted must be brought up in the record, or the appeal will be dismissed. *Per Curiam:* It does not suffice that the judge should state in his judgment that "due proof was made," for this would enable him to deprive the party condemned of his right of appeal on questions of fact. *Jones* v. *Neville*, 478.

14. A statement of facts may be required by a party intending to appeal, at any time before appeal. *Ib.*

V. *Answer of Appellee, and Matters urged for the first time after Appeal.*

15. Where the answer of an appellee prays for the amendment or reversal of any part of the judgment appealed from, it must be filed at least three days before that fixed for the argument, or it will not be received. C. P. 890.
Bludworth v. *Hunter*, 256.

16. Objections to the testimony of a witness, must be made on the trial in the lower court; it is too late to urge them, for the first time, after an appeal.
Beard v. *Pritchard*, 464.

VI. *Right of Appellee to prevent withdrawal of Appeal.*

17. An appellant cannot be permitted, in any case, to withdraw his appeal, without the consent of the appellee. C. P. 901. *Smith* v. *Miller*, 117.

VII. *Costs, and Damages on Appeal.*

18. Where a sum improperly allowed as special damages, is remitted by the counsel of the appellee before the argument of the case on the appeal, and the judgment of the lower court is affirmed in all other respects, the appellant will be condemned to pay the costs. *Brashear* v. *Wilkins*, 57.

19. Where an appeal has been set for trial, and continued, for want of time, till the next term, a prayer for damages for the delay occasioned by the appeal, filed at the second term, will be too late. C. P. 886, 887, 888.
Hebrard v. *Bollenhagen*, 155.

ARREST.

1. Where a plaintiff, after judgment against the debtor, sues to recover a sum of money deposited as a pledge in the hands of the sheriff by the latter, who had been arrested, he must show the forfeiture of the pledge, by the departure of his debtor out of the State within the period during which he was bound to remain in it; for at the end of that time, the debtor had a right to resume the pledge.
Dussin v. *Allain*, 394.

2. In an action against a sheriff for taking an insufficient pledge for the appearance of a debtor who had been arrested, he will be protected by showing that the pledge was not forfeited. *Ib.*

3. Defendant, arrested at the suit of plaintiff, deposited an amount of bank notes in the hands of the sheriff as a pledge for his appearance, and plaintiff, after judgment obtained, levied a *fi. fa.* on the notes, and requested the sheriff to sell them, which the latter refused to do. *Held*, that his refusal rendered him liable to the plaintiff for the value of the notes. *Ib.*

ASSIGNMENT.

1. It matters not in what way the debtor is informed of the transfer or assignment of a debt, provided it be shown that he knew that his former creditor is divested of all right to the debt assigned, and that such knowledge is derived from the transferee or his agent. *Flint* v. *Franklin*, 207.
2. The definition of notice in the 23d paragraph of art. 3522 of the Civil Code, does not apply to notices of the transfer, or assignment of debts. *Ib.*
3. Notice of the transfer of a debt secured by an endorsed note, given to the last endorser, is sufficient. The liability of several endorsers cannot be transferred to different persons. *Per Curiam:* The endorsers are each bound for the whole of the debt; and if the last endorser should pay, he would have his recourse against the endorser immediately preceding him, which is inconsistent with a right to transfer the liability of different endorsers to different transferees. *Ib.*

ATTACHMENT.

1. Where an attachment has been obtained, under the 7th section of the act of 7 April, 1826, by a plaintiff whose debt is not yet due, on making oath that his debtor is about to remove his property out of the State before his debt becomes due, and swearing to the other facts required by that act, evidence will be admissible, on the part of the defendant, to prove conversations and declarations of the latter, made out of the presence of the plaintiff, previous to his leaving the State, and a short time before the attachment, with a view to show that his removal from the State was not intended to be permanent.

Offutt v. *Edwards*, 90.

2. Where an affidavit is made that a defendant has left the State with a view not to return, his subsequent return will not, alone, be sufficient to dissolve the attachment, where circumstances render it probable that the original intention was not to return; otherwise, where nothing suspicious existed, or where an intention to return is proved. *Ib.*
3. Where an affidavit is made for an attachment, some *prima facie* proof must be adduced by the defendant that the facts sworn to are not true, to throw the burthen of proving their truth on the plaintiff. *Ib.*
4. Where an attachment has been taken out under the act of 7 April, 1826, but under circumstances that did not justify it, the defendant is entitled to compensation for any injury he may prove that he has sustained thereby, and for the trouble and expense to which he may have been subjected. He may also recover what he has paid for professional services in dissolving the attachment;

but not the fees of the counsel employed to prosecute his claim for damages. His right to damages for injury to his reputation and credit, depends upon the motive of the plaintiff; if it were the purpose of the latter, without probable cause, to injure or harrass him, the damages should be exemplary; *aliter*, if no other motive induced the proceeding, than an honest desire to secure the payment of a just debt. *Ib.*

5. The remedy by attachment is a harsh and severe one, and should not be resorted to but in case of actual necessity. *Ib.*

6. A debtor whose property is attached cannot divest himself of it, so as to defeat the rights of the attaching creditor. *Bach* v. *Goodrich*, 391.

7. An action against one who had instituted a suit against plaintiffs by attachment, in which there was judgment in favor of the latter, for damages beyond the amount of the attachment bond, on the ground of the proceeding being malicious, cannot be considered as an action on the bond for an illegal attachment. It is in the nature of an action for a malicious prosecution.

Sénécal v. *Smith*, 418.

8. Where the debtors of one who has been declared a bankrupt, are aware of the fact, and in their answers to interrogatories, propounded to them as garnishees in an attachment suit, state, that they still owe the debt, without mentioning in any way the application of their creditor to be declared a bankrupt, they will be liable to the assignee of the bankrupt, though they have paid the amount of their debt to the plaintiff in the action in which they were made garnishees. *Per Curiam:* They omitted to give notice of a fact which they were bound to disclose. *Nugent* v. *Opdyke*, 453.

ATTORNEY AT LAW.

1. Service of citation of appeal on an agent of an attorney at law representing an absentee, is insufficient. *Clark* v. *Delahoussaye*, 5.

2. It is no defence to an action by two members of the bar associated in the practice of law, for a conditional fee promised in case of success, that one of them, having been raised to the bench, took no part in the trial of the case. *Per Curiam:* Where business is entrusted to two professional gentlemen associated in the practice, it may be attended to by either.

Simon v. *Brashear*, 59.

3. A promise of a conditional fee to an attorney at law, for his services in a case, to be paid in the event of a decision in favor of the obligors, though made after he had been retained in the case, is legal, and for a sufficient consideration, and the amount may be recovered, if the condition be fulfilled.

Clay v. *Ballard*, 308.

BAIL.

Bail cannot be made liable, where no *capias ad satisfaciendum* was sued out before the passage of the act of 28 March, 1840, abolishing imprisonment for debt. The bail was discharged by that act, as no *ca. sa.* could be issued after

its passage, and it is only on the return of such a writ that proceedings can be had against the bail. *Waring* v. *Crawford*, 291.

BANKS.

The acts of the 14 and 26 March, 1842, chaps. 98, 157, relative to the liquidation of banks, show the intention of the legislature to have been, that all contests relative to the liabilities of banks put in liquidation, should be cumulated before the court which pronounced the judgment putting them in liquidation. The 24th sect. of the act of 14 March, 1842, assimilates the proceedings in relation to banks in liquidation, except where otherwise provided, to those under the laws relative to the voluntary surrender of property, and thereby establishes a *concurso* in a modified form.

Dorville v. *Citizens Bank of Louisiana*, 362.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Election of Domicil as to Promissory Notes in favor of Banks, under the Act of* 13 *March*, 1818.
II. *Of Notes signed by one of the Makers as Surety.*
III. *Transfer.*
IV. *Protest.*
V. *Allegations and Evidence in Actions on Bills and Notes.*
VI. *Defence to Actions on Bills and Notes.*

I. *Election of Domicil as to Promissory Notes in favor of Banks, under the Act of* 13 *March*, 1818,

1. One who seeks to render an endorser liable under the act of 13 March, 1818, relative to the election of domicil with regard to promissory notes made in favor of the banks of this State (no opinion being expressed as to whether that statute be still in force,) must show notice of protest, in due time, at the place indicated by the maker as his elected domicil, which, by legal intendment, becomes, *pro hac vice*, the domicil of the endorser, unless, under the third section of that act, he shall have elected another domicil above his signature. Where a bank relies on a constructive notice, and a notarial certificate to prove it, in a case in which the banking-house was the elected domicil, it must appear from the certificate that the notice was left at the banking-house, and addressed to the endorser at that place. A certificate that the notice was served by leaving it with the cashier of the bank, is insufficient; it does not show but that the notice may have been given to him at some other place than the banking-house, nor does it show how it was addressed.

Union Bank of Louisiana v. *Smith*, 75.

II. *Of Notes signed by one of the Makers as Surety.*

2. Where in an action on a joint note, it is shown that defendant signed it as

surety, he will be liable for the whole amount, though on the face of the instrument, as a joint debtor, responsible only for half. *Butler* v. *Ford*, 112.

III. *Transfer.*

3. Notice of the transfer of a debt secured by an endorsed note, given to the last endorser, is sufficient. The liability of several endorsers cannot be transferred to different persons. *Per Curiam:* The endorsers are each bound for the whole of the debt; and if the last endorser should pay, he would have his recourse against the endorser immediately preceding him, which is inconsistent with a right to transfer the liability of different endorsers to different transferees. *Flint* v. *Franklin*, 207.

4. Where a note, taken in the ordinary course of business, before maturity, for full value, and without notice of any equities, is sold at a sheriff's sale under a *fi. fa.* against the holder, the purchaser will acquire all his right, title and interest; and this, though public notice may have been given at the time of the sale, of equities existing between the original parties to the sale. Such a notice cannot prevent the purchaser from being subrogated to all the rights of the defendant in execution, nor vary those rights in the slightest degree. C. C. 2598, 2616. *Adams* v. *Avery*, 431.

IV. *Protest.*

5. Action by the holders against the endorsers of an inland bill of exchange, protested for non-payment. Plaintiffs received the protested bill two or three days after protest, but no notice was given to the endorsers. Several days after, plaintiffs received by mail, under cover from the notary, notices addressed to the endorsers, and on the next day they put them into the post-office. It was not shown that the notices were correctly addressed to the domicils of the endorsers: *Held*, that there must be judgment as in case of nonsuit.
New Orleans Gaslight and Banking Company v. *Brice*, 110.

6. The executor of a deceased endorser is the proper person on whom to serve a notice of protest, though the instituted heir may have been admitted as heir, and have given security and taken possession of the property, where the executor has not rendered any account, nor received from the heir the money necessary to pay the debts of the succession. *Per Curiam:* Creditors may look to the executor as the proper representative of the estate until he has been discharged, especially where the instituted heir resides out of the State.
New Orleans and Carrollton Rail Road Company v. *Kerr*, 122.

7. Where an endorser, living about fifteen miles from the place where the protest was made, has a box in the post-office at that place, and is in the habit of receiving his letters there, a notice of protest addressed to him there, will be good under the second section of the act of 13 March, 1827, though there be another office nearer to his residence, it being proved that he never received any letters or papers through it. *Ib.*

8. The rule that notice of protest of a bill or note must be sent to the post-office nearest to the residence of the party intended to be charged, is a general one,

but not of universal application. The rule is founded on the presumption that the endorser will receive notice earlier, if directed to the post-office nearest to his residence: but this presumption ceases where the difference in the distance of the two offices is but small, and it is shown that the party is in the habit of receiving his letters and papers at the office which is the more distant.

New Orleans and Carrollton Rail Road Company v. *Robert*, 130.

9. A notice of protest directed to a party at the post-office from which he receives his letters, being the nearest to his residence, and deposited there, is insufficient under the second section of the act of 13 March, 1827. The notice must, in addition, be addressed to him at his domicil, or usual place of residence.

Harris v. *Alexander*, 151.

10. Under the general commercial law prevalent in most of the States, the post-office is to be used as a means of conveyance, not as a place of deposit for notices of protest; and a notice directed to a party at the nearest post-office, and the one from which he receives his letters, aed deposited there, would, under its provisions, be insufficient. *Ib.*

11. Where a notice of protest addressed to an endorser by mail, is directed to the post-office nearest to, and in the same parish with his residence, the name of the post-office and the State being mentioned, it will be sufficient, though the name of the parish be not inserted in the address, nor any further specification of his dimicil or usual place of residence. Act 13 March, 1827, §. 2. *Mainer* v. *Spurlock*, 161.

12. The omission of the names of the drawees of a bill, in the description of the draft in the notice of protest to an endorser, is unimportant, where the date, amount, and names of the drawer and payee, are mentioned. *Per Curiam:* The law has not pointed out, nor required any particular form of notice; it is sufficient if the party to whom it is sent, is enabled to ascertain therefrom the nature, and extent of the obligation, which has become the subject of the protest. *Ib.*

13. Where an endorser who resides alternately in different parishes, and has not declared in the manner prescribed by law, his intention of fixing his principal establishment in either, is in the habit of receiving his letters and papers at the two post-offices nearest to his different places of residence, a notice of protest sent to either will suffice. *Crawford* v. *Read*, 243.

14. The signature of two witnesses to the protest of a bill or note, is not required by any law. The first section of the act of 14 February, 1821, requires that two witnesses shall attest the entry, made by the notary in his books, of the manner in which notices to the drawers and endorsers have been served or forwarded; but this has nothing to do with the protest itself. *Ib.*

15. The omission to name the parish in which the post-office is situated to which notice of a protest is sent, is not fatal, provided the post-office be the nearest to the residence of the party notified. *Ib.*

16. As a general rule, whenever the mail is resorted to as the means of conveyance of a notice of protest, the notice must be sent to the post-office nearest to the residence of the party, addressed to him at his domicil, or usual place of residence. *Priestly* v. *Bisland*, 528.

V. *Allegations and Evidence in actions on.*

17. A general allegation of a demand of payment previous to the inception of suit on promissory note, is sufficient to authorise proof of demand at the place of payment mentioned in the note. *Parker* v. *Bernard*, 18.

18. The certificate of a notary that the parties to an inland bill of exchange, protested for non-payment, were notified of the protest on the day that it was made, by notices to the drawer and endorsers, enclosed in a letter put in the mail and directed to the last endorser, is insufficient to prove notice under the act of 13th March, 1827.

New Orleans Gas Light and Banking Company v. *Brice*, 110.

19. Where the payee of a bill of exchange or promissory note, having endorsed it in blank, again becomes the holder, he may recover on it, though there be subsequent endorsements in full upon it, without showing any receipt, or endorsement back to him, from any of the endorsers, whose names he may strike out, or not, as he pleases. *Hébrard* v. *Bollenhagen*, 155.

20. By the first section of the act of 13 March, 1827, the mention made by a notary in his protest of the demand made upon the drawer, acceptor, or other person on whom an order for the payment of money, or bill, or note, is drawn or given, and of the manner in which it was made, is sufficient proof thereof; and a certified copy of such protest, is evidence of all the matters therein stated. *Ib.*

21. Where the original protest of a bill or note was produced in evidence on the trial below, without objection, the fact that that the record does not show that the protest had been recorded by the notary, pursuant to the act of 14 February, 1821, is immaterial. It the absence of any proof that it was not recorded, it will be presumed that the notary complied with the law.

Pogne v. *Hickman*, 158. *Mainer* v. *Spurlock*, 161.

22. Where the defendant denies that any consideration was given for a promissory note on which he is sued, the plaintiff must prove the consideration, or he cannot recover. *Copley v. McFarland*, 183.

VI. *Defence to action on.*

23. Defendant signed a promissory note as agent for J. F., a third person, payable to his own order, and having endorsed it in his own name, presented it to plaintiffs for discount. The latter not being satisfied that defendant was authorized to sign as agent, without his knowledge or consent, struck out the words "For J. F." under his signature as maker, and erased his name as payee and endorser; and, on the substitution of a new payee and endorser, discounted the note. In an action against defendant: *Held*, that plaintiffs could not mutilate the note, and bind the appellee as drawer, without his consent. *Louisiana State Bank* v. *Fuselier*, 26.

24. A *fi. fa.* having been levied on a note, drawn by a third person, payable to another or bearer, as the property of the defendant in execution, in whose possession it was, the latter wrote his name on the back of the note, as he stated at the time, for the purpose of identifying it. The name of the latter was not mentioned in the description of the note in the sheriff's advertise-

ment of its sale, nor alluded to in the deed from him to the purchaser. That officer testified, that he did not consider the defendant in execution as guarantying the payment of the note; that he sold it as the property of the latter, according to the terms of the advertisement; that the defendant in execution was not present at the sale, and gave no notice that he did not consider himself liable on it; and that, he thinks, the purchaser bought it on the faith of the endorsement of the defendant in execution. An assignee of the purchaser having pleaded the amount of the note, in compensation of a claim sued on by the defendant in execution: *Held*, that the endorsement was made only to identify the note; that the note was neither advertised nor sold as secured by the endorser's liability, but was seized and sold as his property; and that his own endorsement cannot be considered as making any part of the property on which the execution was levied. *Kennard* v. *Gustine*, 170.

25. To entitle the maker of a promissory note to plead a debt due to him by the payee as an offset, when sued by a *bona fide* endorsee, the maker must prove that the note was transferred after maturity. *Gordon* v. *Downes*, 265.

26. The decisions that the word *executor* or *administrator*, affixed to the name of the maker of a note or draft, are mere words of description, neither adding to, nor diminishing the personal responsibility of the party using them, and that an executor or administrator has no authority to bind the estate by notes or drafts, mean only that an executor or administrator cannot, by making or endorsing a note or draft in his official capacity, bind the estate when not originally liable for the debt, but that he will thereby render himself responsible, individually, for the amount. *Gillet* v. *Rachal*, 276.

See PRESCRIPTION, 1, 2,

BOUNDARY.

1. In an action of boundary between parties, both of whom claim under the United States, the controversy will be decided according to the laws of this State. *Sprigg* v. *Hooper*, 248.

2. Any reference to the titles of the parties in an action of boundary, is only for the purpose of establishing the boundaries in accordance with them, and not to determine who is the legal owner. C. C. 837, 839, 841. This action may be brought by the owner, or by any one who possesses as owner. C. C. 825. *Ib.*

BUILDER.

See UNDERTAKER.

CITATION.

1. Where one resides alternately in different parishes, and has made no declaration, in the mode prescribed by law, as to his intention to fix his principal establishment, he may be cited in either, at the option of the party interested. C. C. 42, 43, 44, 45. C. P. 166. *Crawford* v. *Read*, 243.

2. In proceedings to remove an executor, curator, or other administrator of a succession, notice or citation to the defendant is indispensable; without it, the proceedings will be null *ab initio*. The mode of removal has not been altered by the act of 16 March, 1842, chap. 120. *Succession of White—Rehearing*, 354.

See APPEAL, 8, 9.

CLERK OF COURT.

1. Where a new trial has been granted after judgment signed, the clerk cannot disregard the order, and issue execution, though the court may have erred in allowing a new trial. He is but a ministerial officer, and has no right to take upon himself to decide whether a new trial was improperly granted or refused. *Smith* v. *Delahoussaye*, 50.
2. The act of 19th February, 1825, relative to the recording of judicial proceedings, was intended to provide more effectually for the preservation of the evidence of judicial decisions; and it is as much the duty of clerks of court to comply with its provisions, as to perform any other official duty for which they are allowed a fixed compensation. *Matter of J. T. Mason*, 105.

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COMPENSATION.

1. Compensation does not take place where either of the debts is unliquidated. C. C. 2205. *Copley* v. *Lambeth*. 137.
2. Compensation does not take place by operation of law, between accounts due to a partnership, and those due individually by its members. *Lewis* v. *Moore*, 196.
3. To entitle the maker of a promissory note to plead a debt due to him by the payee as an offset, when sued by a *bona fide* endorsee, the maker must prove that the note was transferred after maturity. *Gordon* v. *Downes*, 265.
4. A party sued as the maker of a promissory note, cannot plead in compensation law costs paid by him in suits, not yet decided, commenced against persons disturbing him in the possession of land sold to him by the plaintiff, and for which the latter may be ultimately responsible under his warranty as vendor. The costs are not yet due. C. C. 2495. *Lacour* v. *Landry*, 529.

CONFLICT OF LAWS.

1. The law establishing and regulating the matrimonial community of gains is a real statute, operating, where the parties were not married in this State, only on property acquired here. *Succession of Packwood*, 438.
2. As a general rule personal property has properly no other *situs* than the domicil of the owner, and its disposition or transmission by contract, or inheritance, depends upon the law of the owner's domicil, saving the rights acquired by creditors by attachment, or otherwise, before delivery or notice. This is especially true of debts which follow the person of the owner or creditor. *Ib.*
3. The deceased and her husband, having removed from this State, resided in another at the time of her death. A part of a crop raised on a plantation belonging to the community in this State, having been sold by an agent here before the death of the wife, the proceeds were deposited to the credit of the husband in a bank in this State, and subsequently remitted to him in negotiable certificates of deposit. *Held*, that the produce of the plantation, no longer existing in kind, but having merged in a debt due from the bank, could not be identified; that the amount deposited became the property of the husband, at the place of his domicil; and that its distribution, or inheritance, depends on the law of that place. Had the crop remained on the plantation, unsold at the death of the wife, it might have been otherwise. *Ib.*

CONSTITUTION.

I. *Constitution of the United States.*
II. *Constitution of the State.*
III. *Constitution of the State of Mississippi.*

I. *Constitution of the United States.*

1. The ordinances of the Council of the Second Municipality of New-Orleans, of the 23d and 30th June, 1842, imposing a wharfage charge on all packages landed in or shipped from the limits of the Municipality, do not conflict with the provisions of the constitution of the United States which give Congress the power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, and declare that no tax or duty shall be laid on articles exported from any State, and that no State shall, without the consent of Congress, lay any impost or duties on exports, except what may be absolutely necessary for executiong its inspection laws.
Worsley v. *Second Minicipality of New Orleans*, 324.
2. The constitution of the United States never intended to give Congress authority to interfere with the laws of the States, in relation to the ordinary facilities afforded to commerce in the shape of wharves and other instruments or means of trade, and in the preservation of harbors and the keeping open of rivers. *Ib.*
3. An *impost*, *tax*, or *duty*, is an exaction to fill the public coffers, for the payment of the debts, and the promotion of the general welfare of the country. A retribution provided to defray the expense of constructing bridges or causeways, or removing obstructions in a water course, to be paid by those only who enjoy the advantages resulting from such expense, is neither an impost, tax, nor duty. *Ib.*

II. *Constitution of the State.*

4. The legislature of this State, unlike the Congress of the United States which can do nothing that the Federal constitution does not authorize, may exercise any power not prohibited by the State constitution. *Bozant* v. *Campbell*, 411.
Art. 4, sect. 2. Supreme Court. *Coons* v. *Threldkeld*, 153.
——— 12, Judgments, how to be rendered, *Jones* v, *Neville*, 478,

III. *Constitution of the State of Mississippi.*

Art. 7, sect. 2. Prohibiting introduction of slaves, with certain exceptions, after 1 May, 1833. *Clay* v. *Ballard*, 308.

CONTRACTS.

1. In an action against an architect or builder, under art. 2733 of the Civil Code, for damages on account of the badness of the materials or work in a house built by contract, plaintiff must establish that the bad condition of the building

resulted from the character of the materials or workmanship. Under the Under the Code Napoleon, art. 1792, the undertaker is liable where the building cracks, or falls in consequence of a defect in the soil on which it was erected. *Aliter*, under the Civil Code of this State. *Fremont* v. *Harris*, 23.

2. In an action by a wife against her husband for a separation of property, a judgment was entered by consent, pronouncing the separation and settling the claims of the wife, and reciting that it is further agreed that the plaintiff shall confess judgment in favor of certain persons, not parties to the suit, for the amounts claimed by them in suits in the Parish Court of the parish, and assume to pay the same. An injunction having been sued out against a *fi. fa.* obtained by the parties in whose favor the stipulation was made: *Held*, that the clause in the judgment did not authorize the issuing of a *fi. fa.*, and that it can be viewed only as a *stipulation pour autrui*, of which, if valid, the parties in whose favor it was made can take advantage only by an action against the plaintiff. C. P. 35. *De Blanc* v. *Mouton*, 48.

3. To recover money paid under a commutative contract, to a party thereto, the latter must be put *in mora*. C. C. 1906 to 1920. *Preston* v. *Brashear*, 52.

4. It is no defence to an action by two members of the bar associated in the practice of law, for a conditional fee promised in case of success, that one of them, having been raised to the beuch, took no part in the trial of the case. *Per Curiam:* Where business is entrusted to two professional gentleman associated in the practice, it may be attended to by either.

Simon v. *Brashear*. 59.

5. A writen promise to pay a certain rate of interest, signed by a married woman, without her husband's consent, is of no validity (C. C. 124, 127), nor can it serve as the considebration of any subsequent obligation. *Ross* v. *Ross*, 173.

6. In the interpretation of a contract, it will not be presumed that either party intended to impose an absurd or impossible condition. It will be construed as the parties must be supposed to have understood it at the time of its execution. *Clay* v. *Ballard*, 308.

7. A promise of a conditional fee to an attorney at law, for his services in a case, to be paid in the event of a decision in favor of the obligors, though made after he had been retained in the case, is legal, and for a sufficient consideration, and the amount may be recovered, if the condition be fulfilled. *Ib.*

8. Where a party to a contract acknowledges his inability to comply with his obligation, it is unnecessary to put him regularly *in mora*. C. C. 2042.

Knight v. *Heinnes*, 377.

9. One who has contracted for the building of a house at a fixed price, will be responsible for the value of extra work, where from the evideuce it is clear that it must have been done with his consent. *Doyle* v. *Ryan*, 402.

10. An agreement by a party to secure one against liability as the endorser of a note, in cases the latter would not bid against the former at a judicial sale, is invalid. C. C. 1841, § 12.

Merchants Insurance Company of New Orleans, v. *Addison*, 486.

11. Agreements or securities executed for the price of the commission of a pub-

lic crime, or for the violation of a public law, or the omission of a public duty, can neither be enforced nor confirmed. *Ib.*

12. Where it was stipulated in a contract that the vessel on which a cargo was to be shipped to the purchaser, should go to sea by a particular day, and she was ready to sail on the day, but detained by bad weather for a few days, the purchaser will not be released. *White* v. *Kearney*, 495.

13. Where a party to a contract is not put in default by the terms of the contract, nor by the operation of law, he can be put in default only by the commencement of a suit to compel a performance, by a demand in writing, by a protest made by a notary, or a verbal requisition made in the presence of, and proved by two witness. C. C. 1905. *Ib.*

14. Putting the party in default is acondition precedent to the recovery of damages for the violation of a contract. *Ib.*

15. The usage, on the neglect or refusal of a purchaser to come in a reasonable time, after notice, and pay for and take the goods, for the vendor to sell them at auction, and to hold the buyer responsible for the deficiency in the amount of the sale, is a fair one; but it is not the only mode of ascertaining the damages, for a failure to comply with a contract. *Ib.*

CONTINUANCE.

Though the judges of the lower courts have better means than the Supreme Court of ascertaining the views with which a continuance is applied for, and the latter is generally disposed to sustain their decisions in such cases, yet, where it is evident that a continuance has been improperly refused, relief will be afforded. *Hewlett* v. *Henderson*, 279.

COURTS.

1. Where a tutor, appointed by a Probate Court, sues before a District Court, the latter cannot inquire into the legality of the judgment of the former appointing him tutor. *Per Curiam:* The correctness of the judgment of the Probate Court cannot be questioned in the District Court, where it must have its effect, until set aside in some of the modes prescribed by law. *Leckie* v. *Fenner*, 189.

2. Arts. 604 to 613 of the Code of Practice, authorizing actions to annul a judgment, confine them to the parties to the judgment, and restrict them to the court before which they have been previously litigating. But where a creditor seeks to annul such a judgment, the action must be brought before a court of ordinary jurisdiction. Such an action to annul a judgment for fraud and collusion, is a revocatory action, of which probate courts are without jurisdiction. *Trichel* v. *Bordelon*, 141.

3. In an action by the representatives of the successions of the deceased members of a partnership, before a District Court, for the recovery of debts due to the partnership, evidence is inadmissible to prove claims set up by the defendants against the members of the firm individually. *Per Curiam:* Such claims are exclusively cognizable in the Probate Court, where the successions of the deceased are in course of administration. They cannot be allowed, *ex parte*, in a suit in which the creditors of the estates are not cited, and in which they cannot intervene. *Lewis* v. *Moore*, 196.

4. The Court of Probates may compel an administratrix to render an account to the heirs or creditors, of whatever property has legally come into her possession as such; but where she takes possession of property not belonging to the succession, and which is claimed by another, it has no jurisdiction of any action to recover the property, nor for damages for its detention; nor can jurisdiction be given to it, indirectly, by a demand for an account. *Lawrence* v. *Guice*, 219.

5. Where an insolvent debtor makes a cession of his property, and it is accepted by the judge for the benefit of his creditors, it is thereby vested in them, and cannot be seized, attached, nor levied on in any manner. Act 29 March, 1826, sec. 2. The death of the ceding debtor cannot change the rights of the creditors on the property, which they may retain and sell, as they might have done before his death. C. C. 2176. The only interest which his succession can have, is in any surplus remaining after the payment of the debts; and all that the administrator has to do, is to see that the ceded property is properly administered, and to claim any surplus. Should he, in virtue of his office, or under any other pretext, illegally take possession of the property surrendered, the court before which the surrender was made, is the proper tribunal to enforce the claim of the syndic. *Ib.*

6. Where the value of the property seized under a *fi. fa.* from a Parish Court, is beyond the jurisdiction of the court from which the writ was issued, an injunction may be obtained, by one claiming to be its owner, from a District Court. The circumstances of the case make it a necessary exception to the rules laid down in arts. 395, 397, 617, 629 of the Code of Practice.

McDonogh v. *Doyle*, 302.

7. Original process from a District Court does not run beyond the limits of the district, except in cases specially provided for by the Code of Practice.

Amis v. *Bank of Louisiana*, 348.

8. The executor of the will of one who was domiciliated and died in another State, deriving his powers from a Probate Court of this State, administers only on the property of the deceased situated here; and that part of the estate of the testatrix only is under the control of the courts of this State. Property belonging to the testatrix in another State descends, and must be administered under its laws. *Succession of Packwood*, 438.

COSTS.

1. Where a judgment has been rendered in favor of a plaintiff, the whole judgment, including the costs, is his property. He is supposed to have advanced, or is liable for the costs, and the sheriff must look to him for their payment. And where the property seized and sold for cash to satisfy the judgment, has been purchased by the plaintiff, the sheriff has no right, on the refusal of the plaintiff to pay his costs, to resell the property. Such a sale will be void.

Kershaw v. *Delahoussaye*, 77.

2. A trivial error in the amount of the costs of a judgment, is no ground for enjoining the execution. The injured party may have it corrected, under the order of the judge of the court which rendered the judgment, in the clerk's

office, where all the records and documents necessary to enable the proper costs to be taxed, may be found. *Calderwood* v. *Trent*, 227.

3. The costs of advertising a sheriff's sale, if required to be paid in cash, must be advanced by the sheriff and charged with his costs, or he must call on the plaintiff in execution to provide him with the necessary funds. If not required to be paid in cash, the party will be presumed to have credited the sheriff who employed him, who signed the advertisements and sent them for publication, and who had a right to retain the amount of the charges out of the proceeds of the property, if sold for cash, or, if at a twelve-month's credit, to refuse to transfer the bond to the plaintiff in execution until they were paid.

Haile v. *Rils*, 509.

4. A party sued as the maker of a promissory note, cannot plead in compensation law costs paid by him in suits, not yet decided, commenced against persons disturbing him in the possession of land sold to him by the plaintiff, and for which the latter may be ultimately responsible under his warranty as vendor The costs are not yet due. C. C. 2495. *Lacour* v. *Landry*, 529.

DISCONTINUANCE.

1. As a general principle a plaintiff may discontinue his suit on the payment of costs; but he cannot, by so doing, put the defendant out of court, and defeat any legal rights the latter may have acquired, under a demand in reconvention, to obtain a judgment against him. The plaintiff may abandon his claim, but the defendant must be allowed to prosecute his demand. The right of a defendant to reconvene existed under the Roman and Spanish laws, in force previous to the promulgation of the Code of Practice.

Coxe v. *Downs*, 133. *Smalley* v. *Lawrence*, 210.

2. The plaintiff in an action not submitted to a jury, may discontinue at any time before judgment is rendered by the court. C. P. 491.

Warfield v. *Ludewig*. 240.

DISCUSSION.

See SURETY, 3.

DOMICIL.

One who has not acquired a particular domicil under the statute of 7th March, 1815, may yet have such a residence in a particular parish as will exempt him from being sued out of the judicial district in which such residence has been acquired. *Ames* v. *Bank of Louisiana*, 348.

DONATIONS INTER VIVOS.

Art. 345 of the Civil Code, which declares that "a tutor cannot, without authority from a judge, by and with the advice of a family meeting, accept or

refuse an inheritance which has descended to the minor," does not apply to a sum given to the minors by their grandmother as an advance on their share in her succession. Such a donation may be accepted by the tutor, or by either of the parents, or by any legitimate ascendant of the minors. C. C., 1533.

Spencer v. *Conrad*, 78.

DONATIONS MORTIS CAUSA.

Plaintiff and his brother were joint owners of an undivided tract of land. The latter having made an informal donation *mortis causa* to his wife, of one-half of his share, plaintiff entered into a formal partition with the widow, who sold her portion to the defendant. After her death, plaintiff, as one of her heirs, received part of the price which defendant had paid for the land. In an action by plaintiff to recover the part sold to defendant: *Held*, that by accepting as heir, or co-heir, his share of the estate of defendant's vendor, plaintiff bound himself to warrant defendant's title; that the obligation is an indivisible one, so far as it repels a co-heir seeking to disturb the title of the defendant; that plaintiff cannot insist upon the error of law by which he gave effect to an informal and void donation; and that his acts have made defendant's title as valid as if he were, himself, the vendor. *Smith.* v *Elliot*, 3.

DOTAL PROPERTY.

See Husband and Wife, 1, 4.

DUTY.

See Constitution, 4.

EMANCIPATION OF SLAVES.

Decision in *Fanchonette* v. *Grange*, 5 Rob. 510, affirmed.

Fanchonette v. *Grangé*, 86.

ERROR.

Where a party gives his notes, secured by mortgage, for a certain sum, to a third person, for a title from the latter to a tract of land, in ignorance of his right, under a subrogation from another vendor, to claim a title from such third person, for a smaller sum, such an error in relation to his legal rights, will entitle him to an injunction to stay any proceedings under the mortgage notes.

Jenkins v. *Felton*, 200.

See Donations Mortis Causa.

EVIDENCE.

I. *Introduction of Evidence.*
II. *Onus Probandi.*

III. *Presumption.*
IV. *Interest of Witness.*
V. *Examination of Witness.*
VI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*
VII. *Proof of Contracts, Not in Writing, over Five Hundred Dollars in value.*
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IX. *Inadmissibility of Parol Evidence to prove Title to Real Property.*
X. *Proof of Simulation in a Notarial Act.*
XI. *Admissibility of Parol Evidence to Explain Instruments Sous Seing Privé.*
XII. *Secondary Evidence.*
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XIV. *Evidence of particular persons.*

1. *Parties.*
2. *Agents.*
3. *Partners.*

XV. *Evidence in Particular Actions.*

1. *In Actions on Bills of Exchange and Promissory Notes.*
2. *In Proceedings by Attachment.*
3. *In Actions for the Marital Fourth under art.* 2359 *of the Civil Code.*
4. *In Actions for a Settlement of Partnership Accounts.*
5. *In Proceedings under the* 11*th section of the Act of* 10 *February*, 1841, *where there is a Conflict of Privileges.*
6. *In Petitory Actions.*
7. *In Actions of Rescission.*
8. *In Actions for Malicious Prosecutions.*
9. *In Actions against Sheriffs.*

I. *Introduction of Evidence.*

1. A party who has several witnesses, may rely on the testimony of the one whom he considers the best; but he is not bound to forego his evidence, and to try his case on the evidence of those only who may not be so well informed. *Hewlett* v. *Henderson*, 379.

2. Papers annexed to an answer, but not offered in evidence on the trial, cannot be considered as evidence in the case. *McAuliffe* v. *Déstréhan*, 466.

II. *Onus Probandi.*

3. One who sets up title under a forced alienation, must show a compliance with the formalities of law. It is generally sufficient to show a judgment, execu-

tion and sheriff's deed, to induce the presumption *omnia recte acta*; but this relates to cases in which the proceedings are against the owner himself.

Maskell v. *Merriman*, 69.

4. To authorise one against whom a *fi. fa.* was issued, to enjoin it, for the purpose of pleading in compensation a note of the plaintiff's in execution, the former must show that he acquired the note subsequently to the date of the judgment on which the execution was issued. *Kennard* v. *Henderson*, 165.

5. Where the defendant denies that any consideration was given for a promissory note on which he is sued, the plaintiff must prove the consideration, or he cannot recover. *Copley* v. *McFarland*, 183.

6. Where in an action against the maker of a note, defendant pleaded that he was a minor at the period of its execution, and plaintiff proved that he was engaged in trade at the time, and that the note was executed in relation to such trade, but adduced no evidence of his having been previously emancipated, there should be a judgment of non-suit. *Per Curiam*: The execution of the note being admitted, and the plea of minority relied on, it was incumbent on the plaintiff to bring his case within the exception of art. 379 of the Civil Code, which provides that the *emancipated* minor, who is engaged in trade, is considered of the age of majority for all acts relative to such trade; and the omission of the plaintiff to establish the facts essential to make out his case, must produce the same effect, whether such facts be set forth in his petition, or their proof be rendered necessary by the nature of the defence.

Holliday v. *Marrionneaux*, 504.

7. An allegation in an answer, "that the plaintiffs' claim is neither just nor well founded," puts the justice of the claim at issue, and indirectly denies the statements on which it is based, throwing on the plaintiff the burden of proving his allegations. *Courtebray* v. *Rils*, 511.

See *Planters Bank of Mississippi* v. *Watson*, 267, *note.*

III. *Presumption.*

8. Where slaves brought into this State from another in which they are regarded as chattels, have remained for many years in the possession of a citizen of this State, he will be presumed to be the owner of them; and a *bona fide* purchaser from him, without notice of any title in another, will be protected.—Otherwise, where the purchaser had notice of the claims of a non-resident owner. *Jenkins* v. *Thenet*, 34.

9. In the absence of any evidence of debts existing against a community between husband and wife, the legal presumption is that there are none.

Spencer v. *Conrad*, 78.

10. Where the record furnishes no proof of the laws of the State in which a note sued on was executed, they will be presumed to be the same as our own.

Harris v. *Alexander*, 151.

11. Where the original protest of a bill or note was produced in evidence on the trial below, without objection, the fact that the record does not show that the protest had been recorded by the notary, pursuant to the act of 14 February, 1821, is immaterial. In the absence of any proof that it was not recorded, it will be presumed that the notary complied with the law.

Pogne v. *Hickman*, 158. *Mainer* v. *Spurlock*, 161.

12. All property acquired by either spouse, during the existence of the community of *acquets*, is presumed by law to belong to the community, and is liable for its debts. If the wife claim any property so acquired, as belonging to her individually, she must establish her pretensions by legal proof. The fact of the title having been taken in her name, does not raise even a presumption in her favor. *Smalley* v. *Lawrence*, 210.

13. Where laws of another State are not proved to be different, they will be presumed to be the same as our own. *Spears* v. *Turpin*, 293.
See *Planters Bank of Mississippi* v. *Watson*, 267, *note*.

IV. *Interest of Witness.*

14. Where the plaintiff in an action commenced by injunction, makes oath that the surety in the injunction bond is a material witness on his behalf, and that he cannot safely go to trial without his testimony, and offers other sufficient sureties present and willing to be bound, he will be entitled to have the name of the first surety erased, and the others substituted in his place, that he may examine the former as a witness. Such is the usual practice as to securities for costs and on attachment bonds. *Brashear* v. *White*, 55.

15 The vendor of a moveable, proved to have also an interest in the matter in dispute from being allowed by the vendees to use it occasionally for his own advantage, is not a competant witness to prove the sale and delivery of the article, in a contest between the purchaser, and a creditor who had seized it under an execution from the witness, issued on a judgment for the price.
Webster v. *Jenkins*, 179.

16. Testimony taken under oath, and reduced to writing by the judge, on the first trial of the case, will be admissible in evidence, where the witness has since become interested in, and a party to the suit. *Per Curiam:* The ordinary causes which incapacitate a witness from appearing in open court, and render his testimony admissible when reduced to writing on a former trial, are absence, death, insanity, and sickness. To these may be added, an interest subsequently acquired in the event of the suit. *Wafer* v. *Hemken*, 203.

V. *Examination of Witness.*

17. Objections to the testimony of a witness, must be made on the trial in the lower court; it is too late to urge them, for the first time, after an appeal.
Beard v. *Pritchard*, 464.

18. The affidavits of parties by whom proceedings had been instituted for the removal of the clerk of a court, made on commencing the prosecution, cannot be read as evidence on the trial, where they have not attended, nor afforded the accused an opportunity of cross-examining them.
Matter of J. T. Mason, 105

VI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*

19. Where the plaintiff offered in evidence a duly certified copy of a notarial act, purporting to have been made from a complete and perfect original, to-

gether with the record book of the parish judge, acting, *ex-officio*, as a notary, in which the act appears to have been recorded several years before the trial, and evidence to show that, at the time of the judge's death, his office was in great confusion, that many acts were found incomplete, and the originals of many others lost, an original will be presumed to have existed, and the copy be received as evidence; and this, though an incomplete original of the act of which the copy was offered, may have been found among his papers.

Fanchonette v. *Grangé*, 86.

20. A deputy collector is not an officer authorized to certify copies of documents in his official capacity, and to make them evidence. *White* v. *Kearney*, 495.

VII. *Proof of Contracts not in Writing, over Five Hundred Dollars in value.*

21. The fact that certain notes, endorsed by the defendant, and transferred by him in settlement of a debt due to the plaintiff, were past due, and were transferred to pay a debt for which the defendant was liable, renders it improbable that the plaintiff agreed to release the defendant from his previous responsibility, and is a sufficient corroborating circumstance, taken with the testimony of one witness, to establish an agreement on the part of the defendant to guaranty the payment of the notes so transferred, though for an amount exceeding five hundred dollars. *Warfield* v. *Ludewig*, 240.

22. The positive testimony of one witness, corroborated by the evidence of another, is sufficient to prove a guarantee for an amount exceeding five hundred dollars.

Hickey v. *Dudley*, 502.

VIII. *Lost Writings.*

23. Where in an action on a lost note, an inaccuracy in the description of it in the advertisement, is proved to have been caused by information given to the plaintiff, who could neither read nor write, by one of the defendants, the latter cannot take advantage of the error. *Lebleu* v. *Rutherford*, 95.

IX. *Inadmissibility of Parol Evidence to prove Title to Real Property.*

24. In the absence of any allegation of fraud or error, parol evidence is inadmissible to prove the assent of a party to an alteration, as to the quantity of land in an act of sale of real estate, made by the notary before recording it. The effect of such evidence would be, to prove something said between the parties after the completion of the act, tending to change it materially, and to restrict the title of the purchaser. C. C. 2256. *Labiche* v. *Jahan*, 30.

25. Title to real property can neither be destroyed nor created by parol.

Freret v. *Meux*, 414,

26. The adjudication at an auction sale, of itself, transfers the title of the property to the purchaser. Although in such sales of real estate an act of sale is to be passed, the *procès-verbal*, or certificate of adjudication prepared by the auc-

tioneer, is as binding on the parties as a written agreement to sell. A consent to annul such a sale can only be proved by evidence that would annul a written sale of real property. C. C. 2255, 2415, 2584 to 2588. *Ib.*

X. *Proof of Simulation in a Notarial Act.*

27. A party to a notarial act cannot prove its simulation by parol; it must be shown by a counter-letter, or by the answers of the other party to interrogatories. *Hewlett* v. *Henderson*, 379.

XI. *Admissisility of Parol Evidence to Explain Instruments Sous Seing Privé.*

28. Where a receipt given by an attorney for certain notes transferred to his principal in settlement of a debt due to the latter, does not specify or describe the notes, the evidence of the attorney who made the settlement, will be admissible in an action by his principal on the notes, to prove that the party who transferred them agreed to guaranty their payment. The testimony does not contradict the receipt. *Warfield* v. *Ludewig*, 240.

XII. *Secondary Evidence.*

29. A letter from plaintiff's attorney to defendant, offered in evidence by the latter, is inadmissible, where the attorney is in court, and willing to be examined as a witness. *Bue* v. *Splane*, 6.

30. In an action by the tutrix of the minor heirs of a deceased wife against the administrator of the husband's estate, to recover the amount of a note, made by a third person, and alleged to have been given to the wife by her mother, and the amount received by the husband, the maker of the note, offered as a witness to prove its payment, testified that he had paid its amount, about fourteen years before, to plaintiff, but that the note bore the receipt of the defendant's intestate. The note was payable to the intestate, who obtained the amount from the plaintiff, and receipted for it on the back of the note. On an objection to the testimony, on the ground that the receipt was the best evidence of the payment: *Held*, that the evidence was admissible; that when the plaintiff was reimbursed the amount of the note, she surrendered it doubtless to the intestate; that after the lapse of fourteen years, it cannot be presumed that the note has been preserved; and that the rule, that the best evidence must be produced, means only, that so long as the higher or better evidence is within the power of the party, he shall not be allowed to introduce inferior.

Spencer v. *Conrad*, 78.

31. It is sufficient to account for the absence of an original, at the time when the copy is offered to be read in evidence. *Hewlett* v. *Henderson*, 379.

32. The statement of a witness that a judgment had been obtained in an action between certain parties, and had been assigned to a third person, is inadmissible. The record of the judgment and the written assignment, are the best evidence. Inferior evidence connot be received, until it is shown that the best connot be obtained. *Lockhart* v. *Jones*, 381.

33. Where the evidence discloses that a written agreement must have existed,

the testimony of a witness as to his impressions of its contents, cannot be admitted. The agreement should be produced, or accounted for in some legal manner. *Ib.*

34. The affidavit of a party that "he had handed over a certain letter to his counsel for perusal, and that the said letter has been lost or mislaid, he not being able to find the same in his office, after making diligent search for it," is insufficient to justify the introduction of secondary evidence. *Ib.*

35. A copy of the clearance and manifest of a vessel, certified by a person styling himself the deputy collector of the port for which the vessel cleared, is not the best evidence, and should not be received, where the origials, and the person in possession of them, are within reach of the process of the court, *White* v. *Kearney*, 495.

XIII. *Admissibility of Evidence under the Pleadings.*

36. In an action by the representatives of the successions of the deceased members of a partnership before a District Court, for the recovery of debts due to the partnership, evidence is inadmissible to prove claims set up by the defendants against the members of the firm individually. *Per Curiam:* Such claims are exclusively cognizable in the Probate Court, where the succession of the deceased are in course of administration. They cannot be allowed, *ex parte*, in a suit which the creditors of the estates are not cited, and in which they cannot intervene. *Lewis* v. *Moore*, 196.

37. In a contest between the creditors of a deceased husband and his widow, between whom there existed a community of gains, as to real property purchased during the marriage by the husband in the name of the wife, evidence of the declaration of the husband that he had the receipts for the price made out in the name of his wife to screen the land from his creditors, is admissible. *Per Curiam:* The declarations are evidence to prove that the husband himself was acting fraudently; and, even on the suppositon that he acted as the agent of his wife in making the purchase, she would be bound by his declarations. *Smalley* v. *Lawrence*, 210.

38. The mere denial of the existence of any mortgage, is too general an allegation to authorize the admission of evidence of payment, imputation of payment, prescripton, or the like. Payment, remission, compensation, and the like, must be specially pleaded. *Bludworth* v. *Hunter*, 256.

39. Whether a party is bound by admissions or statements in a letter, the contents of which are offered to be proved, is a question which goes to the effect, and not to the admissibility of the evidence. *Lockhert* v. *Jones*, 381.

40. Evidence which does not correspond with the allegations in the pleadings of the party offering it, is inadmissible. *Nicholls* v. *His Creditors*, 476.

41. Simulation is of two kinds. The first, where the parties intend that no engagement shall take place; the second, where a real contract prohibited by law, is intended to be entered into, under the form and appearance of another contract. In the latter case, under an allegation of simulation, a *dation en paiement* may be proved. *Mandell* v. *Stephens*, 491.

42. Replications being unknown to our practice, any facts which might be pleaded in reply to the defence, may be proved on the trial.

Holliday v. *Marionneaux*, 504.

XIV. *Evidence of Particular Persons.*

1. *Parties.*

43. The answers of a party interrogated on facts and articles form a part of the pleadings, and either party may use them without formally introducing them in evidence. They form a part of the record, from which they cannot be withdrawn. *McKerall* v. *McMillan*, 19.

44. In an action against a tutor for the board, tuition, &c. of his wards, the latter, though represented by their tutor, are substantially parties to the suit, and cannot be called by the plaintiff as witnesses. *Dwight* v. *Smith*, 32.

45. Parties to an action cannot be examined as witnesses, in the ordinary form. *Ib.*

46. A party who propounds interrogatories to his opponent is entitled to categorical answers, confessing or denying the facts set forth by him. C. P. 349, 353 to 356. *Baker* v. *Garlick*, 125.

47. A witness may prove, in an action to rescind a sale, that the plaintiff told him, that a slave had informed him (plaintiff) of the redhibitory vice complained of previous to the sale. *Per Curiam:* It was an admission of one of the parties, which the other wished to avail himself of, to show that the former was aware of the vice. The matter intended to be proved was the admission of the party—not the statement of the slave. *Lewis* v. *Gibson*, 146.

48. Where a party resorts to the conversations or admissions of the other, made out of his presence, he must take the whole or none. He cannot call for those portions of the statements which are favorable to his case, and reject the rest. *Ib.*

49. A defendant interrogated as to whether she had refused to pay the note sued on, may add to her answer stating that she had so refused, the reasons which induced her to do so. A party interrogated as to a particular fact, may state other facts qualifying the answer he is called on to make, provided they be closely linked to that about which he was questioned. C. P. 353.

Ross v. *Ross*, 173.

50. A party within the verge of the court during the trial, may be called on to answer, *instanter*, interrogatories, as to matters requiring no recurrence to accounts or written memoranda. *Hayden* v. *Davis*, 323.

2. *Agents.*

51. An account rendered by a clerk or book-keeper of a merchant or trader, showing a balance to be due to the party to whom it was rendered, is not binding on his employer, without evidence of other authority than that usually conferred upon such an agent, who has no more power to state an account and acknowledge a balance as due by his employers, than he has to bind them by signing a note. To acknowledge a debt, the power must be express and special. C. C. 3966. *Spears* v. *Turpin*, 293.

52. In a contest between an intervening party and the plaintiffs, attaching cre-

ditors, the evidence of an agent of the intervenors, to whom bills of lading of the property attached had been delivered, is admissible to prove statements made by the debtor as to the purpose to which the property was to be applied. They are part of the *res gestæ*. *Lockheart* v. *Jones*, 381.

3. *Partners.*

53. The admissions of a partner, previous to the dissolution of the partnership, are evidence against his co-partner: but when made after the dissolution, though in relation to a transaction commenced during its existence, and not completed when the admissions were made, they are inadmissible.

White v. *Kearney*, 495.

XV. *Evidence in Particular Actions.*

1. *In Actions on Bills of Exchange and Promissory Notes*

54. A general allegation of demand of payment previous to the inception of suit on a promissory note, is sufficient to authorize proof of demand at the place of payment mentioned in the note. *Parker* v. *Bernard*, 18.

55. One who seeks to render an endorser liable under the act of 13th March, 1818, relative to the election of domicil with regard to promissory notes made in favor of the banks of this State, (no opinion being expressed as to whether that statute be still in force,) must show notice of protest, in due time, at the place indicated by the maker as his elected domicil, which, by legal intendment, becomes, *pro hac vice*, the domicil of the endorser, unless, under the third section of that act, he shall have elected another domicil above his signature. Where a bank relies on a constructive notice, and a notarial certificate to prove it, in a case in which the banking-house was the elected domicil, it must appear from the certificate that the notice was left at the banking house, and addressed to the endorser at that place. A certificate that the notice was served by leaving it with the cashier of the bank, is insufficient; it does not show but that the notice may have been given to him at some other place than the banking-house, nor does it show how it was addressed.

Union Bank of Louisiana v. *Smith*, 75.

56. The certificate of a notary that the parties to an inland bill of exchange, protested for non-payment, were notified of the protest on the day that it was made, by notices to the drawer and endorsers, enclosed in a letter put in the mail and directed to the last endorser is insufficient to prove notice under the act of 13th March, 1827.

New Orleans Gas Light and Banking Company v. *Brice*, 110.

57. Action by the holders against the endorsers of an inland bill of exchange, protested for non-payment. Plaintiffs received the protested bill two or three days after protest, but no notice was given to the endorsers. Several days after, plaintiffs received by mail, under cover from the notary, notices addressed to the endorsers, and on the next day they put them into the post-office. It was not shown that the notices were correctly addressed to the domicils of the endorsers: *Held*, that there must be judgment as in case of non-suit. *Ib.*

58. By the first section of the act of 13 March, 1827, the mention made by a notary in his protest of the demand made upon the drawer, acceptor, or other

person on whom an order for the payment of money, or bill, or note, is drawn or given, and of the manner in which it was made, is sufficient proof thereof; and a certified copy of such protest, is evidence of all the matters therein stated. *Hébrard* v. *Bollenhagen*, 155.

59. Where a defendant in an action on a promissory note alleges in his answer that the note was obtained by the plaintiff by fraud and deception, that he signed it only as surety, and that it was to have been signed by two or three other persons, evidence is admissible to prove that he signed it as such, and that it was to have been signed by others as alleged. *Ross* v. *Ross*, 173.

2. *In Proceedings by Attachment.*

60. Where an attachment has been obtained, under the 7th section of the act of 7 April, 1826, by a plaintiff whose debt is not yet due, on making oath that his debtor is about to remove his property out of the State before his debt becomes due, and swearing to the other facts required by that act, evidence will be admissible, on the part of the defendant, to prove conversations and declarations of the latter, made out of the presence of the plaintiff, previous to his leaving the State, and a short time before the attachment, with a view to show that his removal from the State was not intended to be permanent.

Offutt v. *Edwards*, 90.

61. Where an affidavit is made that a defendant has left the State with a view not to return, his subsequent return will not, alone, be sufficient to dissolve the attachment, where circumstances render it probable that the original intention was not to return; otherwise, where nothing suspicious existed, or where an intention to return is proved. *Ib.*

62. Where an affidavit is made for an attachment, some *prima facie* proof must be adduced by the defendant that the facts sworn to are not true, to throw the burden of proving their truth on the plaintiff. *Ib.*

3. *In Actions for the Marital Fourth, under art.* 2359 *of the Civil Code.*

63. The action for the *marital fourth*, given to the surviving spouse by art. 2359 of the Civil Code, presupposes a liquidation and final settlement of the succession of the deceased husband or wife. It is only after such liquidation has been made and the real situation of the estate ascertained, that the right of action accrues, and that the court, to which the application is made, can determine as to the existence of the two essential facts required by law to be established, to-wit: that the deceased died rich, and that the survivor is in necessitous circumstances. To maintain such an action the survivor must consequently, show, either a regular settlement of the estate of the deceased spouse, or that the heirs have received a specific amount of money or property of the succession, which they detain without having made any such settlement. *Duriaux* v. *Doiron*, 101.

4. *In Actions for a Settlement of Partnership Accounts.*

64. Where there has been a settlement of accounts between partners, and a note given by one to the other for the balance found due, on an allegation of error, the former may go into an investigation of the accounts, and show that the

note was given in error; but the settlement will be presumed to be correct, until the contrary is shown by the party alleging it. Receipted accounts embraced in such a settlement, will be admissible in evidence, subject to the right of the opposite party to show that they were erroneously allowed.

Green v. *Glasscock*, 119.

65. Where an account has been settled between the parties, and a balance struck, the account must be regarded as an entire thing, subject to proof of error, and the debit side cannot be given in evidence without the credit side. *Ib.*

5. *In Proceedings under the 11th section of the Act of 10th February, 1841, where there is a Conflict of Privileges.*

66. The proceedings under the 11th section of the act of 10th February, 1841, before the court to which all the suits and claims against the property of a a debtor have been transferred, where a conflict of privileges has arisen between different creditors, are in the nature of *concurso*, in which all the parties are plaintiffs and defendants. Where a particular claim has been opposed by one creditor, it is for the benefit of all the others. The evidence introduced by an opposing creditor may be used by the rest; and they will be bound by that introduced in favor of the claim so opposed. A creditor cannot take advantage of part of the evidence of another opponent, and reject the answers to interrogatories drawn from the creditor whose claim is opposed. Each opponent may introduce further evidence, but that spread upon the record cannot be divided. *Caffin* v. *Pollard*, 300.

6. *In Petitory Actions.*

67. The plaintiff in a petitory action may introduce evidence to support an allegation in the petition, that the only title of the defendant was derived from him, and that the latter holds under him. Such evidence is admissible to show under what pretext the defendant took possession, and to destroy the plea of prescription. If the defendant got possession under color of a title derived from the plaintiff, he cannot throw it aside and set up his possession against it, and maintain a plea of prescription; but if he did not obtain possession under it, the plaintiff cannot force the title on him, against his will.

Broughton v *King*, 215.

68. An allegation in the answer of the defendant in a petitory action, that he has a title translative of property, unaccompanied by any statement as to its character or derivation, will not entitle him to be considered any thing more than a mere trespasser, against whom it is unnecessary that the plaintiff should show a title perfect in all respects: one, apparently good, sufficing. *Ib.*

7. *In Actions of Rescission.*

69. Where, in an action to rescind the sale of a slave, it is proved that he ran away within two months after the sale, plaintiff will not be required to show that the vice existed before the sale, nor to allege or prove that the slave had been less than eight months in the State. Act 2 January, 1834, § 3. It is for the defendant to allege and prove that the slave has been more than eight months in the State. *Fazende* v. *Hagan* 306.

70. In an action of rescission by the purchaser of a slave, plaintiff must prove a tender of him to defendant. *Ib.*

8. *In Actions for Malicious Prosecutions.*

71. In an action for damages for a malicious prosecution, malice is usually, but not always implied, from the want of probable cause for the prosecution; it will not be implied where the person against whom it is charged, is a man of high reputation, of a humane disposition, and nothing induces the belief that he had any cause of displeasure which could prompt him to injure the person he had accused. *Digard* v. *Michaud*, 387.

72. The plaintiff in an action for damages for a malicious prosecution must prove the want of probable cause. There must be some positive evidence to show that the prosecution was groundless. *Ib.*

73. An action against one who had instituted a suit against plaintiffs by attachment, in which there was judgment in favor of the latter for damages beyond the amount of the attachment bond, on the ground of the proceeding being malicious, cannot be considered as an action on the bond for an illegal attachment. It is in the nature of an action for a milicious prosecution; and in such a case malice, and the want of probable cause for the original action, are essential. Malice may be proved expressly, or be inferred from the total want of probable cause of action; but malice alone, however great, if there was probable cause for the prosecution, is insufficient to maintain an action for damages for a malicious prosecution. *Sénécal* v. *Smith*, 418.

9. *In Actions against Sheriffs.*

74. Where a plaintiff, after judgment against the debtor, sues to recover a sum of money deposited as a pledge in the hands of the sheriff by the latter, who had been arrested, he must show the forfeiture of the pledge, by the departure of his debtor out of the State within the period during which he was bound to remain in it; for at the end of that time, the debtor had a right to resume the pledge. *Dussin* v. *Allain*, 394.

75. In an action against a sheriff for taking an insufficient pledge for the appearance of a debtor who had been arrested, he will be protected by showing that the pledge was not forfeited. *Ib.*

EXCEPTION.

See PLEADING, 27, 28.

EXECUTOR.

See SUCCESSIONS, 1.

EXECUTORY PROCESS.

The notice required by art. 735 of the Code of Practice, to be given by a creditor in possession of an act importing a confession of judgment, before proceeding against a debtor or his heirs, is to be served by the sheriff; but it is not necessary that it should be signed by him. The notice may be made out by the clerk of the court in which the petition is filed. The object of the notice is to accord a delay to the debtor before issuing the writ, to enable him to appeal

or protect his rights by any other mode. If the delay be given, the form of the notice is immaterial. Service of a copy of the petition on the debtor is not necessary. *Nash* v. *Johnson*, 8.

FIERI FACIAS.

1. Under a *fieri facias*, issued on a twelve months' bond, the sheriff may seize at once, but the defendant has a right to point out other property, not specialty mortgaged in the bond, within three days, or until the property seized has been advertized; but not afterwards. *Pumphrey* v. *Dalahoussaye*, 42.

2. Notices of a sheriff's sale were affixed "at the court house door, and at two other conspicuous places in the same village, in a parish of sixty or seventy miles in length, in which it was shown that there is another village, nearly as large, about eighteen miles below, and a post-office about the same distance above:" *Held*, that this was not a compliance with the act of 6th of April, 1843, chap. 135; that the Legislature did not intend to confine the notice to a single village in an extensive parish, but to give general publicity to sheriff's sales, without incurring the expense of publication in a newspaper. *Ib.*

3. Art. 678 of the Code of Practice, which requires where land, slaves, or other objects susceptible of being mortgaged, are to be sold by the sheriff, that he shall read a certificate obtained from the Register of Mortgages in the parish where the sale is made, to show whether there exist any privileges or mortgages on the property offered for sale, contemplates such a certificate as will exhibit to bidders the situation of the property in relation to existing incumbrances, whether created by the actual owner or previously, so far as the records will enable the Register to ascertain them. C. C. 3357. *Smith* v. *Moore*, 65.

4. Where a judgment has been rendered in favor of a plaintiff, the whole judgment, including the costs, is his property. He is supposed to have advanced, or is liable for the costs, and the sheriff must look to him for their payment. And where the property seized and sold for cash to satisfy the judgment, has been purchased by the plaintiff, the sheriff has no right, on the refusal of the plaintiff to pay his costs, to resell the property. Such a sale will be void.
Kershaw v. *Delahoussaye*, 77.

5. The advertisement by a sheriff of moveable property of a party, against whom a *fi. fa.* has been issued, for sale, without having been seized or taken into possession by that officer, is irregular and illegal; but where the party retains the free use of it, no injury is sustained by him. Such an irregularity will not entitle him to an injunction. *Per Curiam:* It will be time enough for him to complain, when he is disturbed in the possession of the thing.
Calderwood v. *Prevost*, 182.

6. Where one against whom a *fi. fa.* has been issued, purchases his own property at twelve months' credit, and executes a bond for the price, as required by by law, the execution of the bond is a waiver of any objection which he might have urged against the sale, had it been to another, He cannot keep the property, and allege the illegality of the sale; nor can his surety on the bond urge it. *Jones* v. *Frellsen*, 185.

7. A judgment rendered by a Court of the United States against a curator of a vacant succession, cannot be executed by the seizure and sale of the effects of

the succession by the marshal of that court. The effects must remain in the hands of the curator, to be applied to the payment of the debts of the succession in due course of administration. The judgment can be satisfied only by presenting it for classification and payment to the Court of Probates, under the direction of which the succession is being administered. Any sale of the property of the succession, by the marshal under process from the United States court is a nullity. *Kennard* v. *Stanbrough*, 254.

8. A prior mortgagee cannot arrest the proceedings of subsequent mortgagees, merely on the ground of the priority of his mortgage. If the property should not sell for enough to satisfy all the mortgages prior to that of the plaintiff in the seizure, there can be no sale; if it should sell for enough, the latter have a right to proceed. *Bleedworth* v. *Hunter*, 256.

9. The fruits of an immoveable, gathered or produced since it was under seizure, make a part thereof, and enure to the benefit of the person making the seizure (C. C. 457); but crops standing at the time of the sale of the property, are considered part of the land to which they are attached, and pass to the purchaser as part of the consideration of the price. The fruits of mortgaged property are subject to the mortgage only while in the hands of the mortgagor; they cease to be so, when they accrue after its transfer to a *bona fide* purchaser and possessor. C. C. 456. *Ib.*

10. Where the value of the property siezed under a *fi. fa.* from a Parish Court, is beyond the jurisdiction of the court from which the writ was issued, an injunction may be obtained, by one claiming to be its owner, from a District Court. The circumstances of the case make it a necessary exception to the rules laid down in arts. 395, 397, 617, 629 of the Code of Practice.

McDonogh v. *Doyle*. 30.

11. On the insolvency of one of the members of a partnership, his syndic has a concurrent, though not exclusive right to the administration and settlement of its affairs; but the seizure of the interest of his copartner under a *fi. fa.*, does not so divest the title of the latter, and vest it in the sheriff or the creditor, as to give to the officer, or the creditor, the right to claim to administer jointly with the syndic of the insolvent. The effect of the seizure is merely to give a privilege on the thing seized, and a right ultimately to sell it, if not arrested by some judicial order, or legal cause. *Tyler &c.* v. *Their Creditors*, 372.

12. Where a note, taken in the ordinary course of business, before maturity, for full value, and without notice of any equities, is sold at a sheriff's sale, under a *fi. fa.* against the holder, the purchaser will acquire all his right, title and interest; and this, though public notice may have been given at the time of the sale, of equities existing between the original parties to the sale. Such a notice cannot prevent the purchaser from being subrogated to all the rights of the defendant in execution, nor vary those rights in the slightest degree. C. C. 2598, 2616. *Adams* v. *Avery*, 431.

13. A sheriff's sale of moveable effects, or rights and credits, is not valid unless it has been preceded by an appraisement of the property seized, according to the rules laid down in the Code of Practice; and under those rules such property cannot be adjudicated for cash, unless it brings two-thirds of the appraisement. C. P. 671, 675, 676, 680. *Phelps* v. *Righton*, 531.

FOREIGN LAWS.

1. Where the record furnishes no proof of the laws of the State in which a note sued on was executed, they will be presumed to be the same as our own.
Harris v. *Alexander*, 151.

2. Where the laws of another State are not proved to be different, they will be presumed to be the same as our own. *Spears* v. *Turpin*, 293.

FRAUD.

See SALE, 28, 33, 39, 40.

GUARANTEE.

The positive testimony of one witness, corroborated by the evidence of another, is sufficient to prove a guarantee for an amount exceeding five hundred dollars.
Hickey v. *Dudley*, 502.

HUSBAND AND WIFE.

I. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*
II. *Community of Gains.*
III. *Contracts of, and suits against a Married Woman.*
IV. *Action of Separation from Bed and Board, and of Property.*
V. *Action for the Marital Portion.*

I. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*

1. A married woman, under twenty-one years of age, cannot make a valid renunciation of her privileges and mortgages on the property of her husband, in favor of his creditors. Act of 15 March, 1835. *Breaux* v. *Carmouche*, 36.

2. It is not necessary to record the mortgage or lien given by law to secure the paraphernal property of the wife, in order to give it effect against third persons. *Ib.*

3. A wife has no privilege on the moveables of her husband, for her paraphernal property. C. C. 3182. *Stafford* v. *Mead* 142.

4. Where a marriage was contracted in another State, with the *bona fide* intention of making this the matrimonial residence, and, in pursuance of such intention, the parties became, within a reasonable time, domiciliated in this State, the property belonging to the wife before the marriage, and received by the husband at the time, or afterwards, remains her separate estate, according to the laws of this State. *Routh* v. *Her Husband*, 224.

II. Community of Gains.

5. In the absence of any evidence of debts existing against a community between husband and wife, the legal presumption is that there are none.
Spencer v. *Conrad*, 78.

6. In a contest between the creditors of a deceased husband and his widow, be-

tween whom there existed a community of gains, as to real property purchased during the marriage by the husband in the name of the wife, evidence of the declarations of the husband that he had the receipts for the price made out in the name of his wife to screen the land from his creditors, is admissible. *Per Curiam:* The declarations are evidence to prove that the husband himself was acting fraudulently; and, even on the supposition that he acted as the agent of his wife in making the purchase, she would be bound by his declarations. *Smalley* v. *Lawrence*, 210.

7. All property acquired by either spouse, during the existence of the community of *acquêts*, is presumed by law to belong to the community, and is liable for its debts. If the wife claim any property so acquired, as belonging to her individually, she must establish her pretensions by legal proof. The fact of the title having been taken in her name, does not raise even a presumption in her favor. *Ib.*

8. Where a husband and wife, married in another State, remove into this, the laws establishing and regulating the matrimonial community of gains, will operate upon the property acquired during their residence here; and where they subsequently remove from this State, its laws will not operate upon property afterwards acquired here, such acquisitions becoming the property of the party to whom they may belong according to the law of the new domicil of the spouses. *Succession of Packwood*, 438.

9. Where the husband and wife remove into another State, the former will still retain the right of administering property acquired by the community during their residence in this State; and he will continue to be entitled to enjoy the fruits of the dotal property. The removal into another State does not vest in the wife any distinct and separate title to one half of the community property. On her death, one half of the community property acquired in this State, will vest in her heirs, subject to the payment of the debts contracted by the husband during the marriage. Till that time the husband retains entire control of the property, subject to the restrictions imposed by the Civil Code on his power of alienation, when in fraud of the rights of the wife. *Ib*

10. The law establishing and regulating the matrimonial community of gains is a real statute, operating, where the parties were not married in this State, only on property acquired here. *Ib.*

11. The deceased and her husband, having removed from this State, resided in another at the time of her death. A part of a crop raised on a plantation belonging to the community in this State, having been sold by an agent here before the death of the wife, the proceeds were deposited to the credit of the husband in a bank in this State, and subsequently remitted to him in negotiable certificates of deposit. *Held*, that the produce of the plantation, no longer existing in kind, but having merged in a debt due from the bank, could not be identified; that the amount deposited became the property of the husband, at the place of his domicil; and that its distribution, or inheritance, depends on the law of that place. Had the crop remained on the plantation, unsold at the death of the wife, it might have been otherwise. *Ib.*

III. *Contracts of, and suits against a Married Woman.*

12. Emancipated minors cannot, except under certain restrictions, and to a limited extent, dispose of their property, or renounce their rights. C. C. 376, 377. *Breaux* v. *Carmouche*, 36.

13. A written promise to pay a certain rate of interest, signed by a married woman, without her husband's consent, is of no validity (C. C. 124, 127), nor can it serve as the consideration of any subsequent obligation.

Ross v. *Ross*, 173.

14. In an action against a married woman, the authorization of the husband is implied from the fact of his joining his wife, or being joined with her in the suit; but this authorization will not be implied when both are sued, and the wife alone appears. In such a case she will not be considered as acting under his authority. But where both make default, and it does not appear that the husband refused to assist her, a judgment by default may be confirmed against her.

Stone v. *Tew*, 193.

IV. *Action of Separation from Bed and Board and of Property.*

15. No appeal will lie from a judgment, in an action by a wife for a separation from bed and board and of property, ordering the husband to pay alimony at the rate of ten dollars per month pending the suit, the amount not exceeding three hundred dollars, and commanding him to return to the matrimonial domicil.

Malony v. *Her Husband*, 116.

V. *Action for the Marital Portion.*

16. The action for the *marital fourth*, given to the surviving spouse by art. 2319 of the Civil Code, pre-supposes a liquidation and final settlement of the succession of the deceased husband or wife. It is only after such liquidation has been made and the real situation of the estate ascertained, that the right of action accrues, and that the court, to which the application is made, can determine as to the existence of the two essential facts required by law to be established, to-wit: that the deceased died rich, and that the survivor is in necessitous circumstances. To maintain such an action the survivor must, consequently, show, either a regular settlement of the estate of the deceased spouse, or that the heirs have received a specific amount of money or property of the succession, which they detain without having made any such settlement.

Duriaux v. *Doiron*, 101.

IMPOST.

See CONSTITUTION, I.

INJUNCTION.

1. One bound as surety on the twelve-months' bond upon which *fieri facias* was sued, is not disqualified from becoming surety in an injunction bond to arrest its execution. *Pumphrey* v. *Delahoussaye*, 42

2. Where the plaintiff in an action commenced by injunction makes oath, that the

surety in the injuction bond is a material witness on his behalf, and that he cannot safely go to trial without his testimony, and offers other sufficient sureties present and willing to be bound, he will be entitled to have the name of the first surety erased, and the others substituted in his place, that he may examine the former as a witness. Such is the usual practice as to securities for costs and on attachment bonds. *Brashear* v. *White*, 55.

3. One who has succeeded in obtaining the dissolution of an injunction, cannot recover an attorney's fee as special damages, where the evidence does not show that any fee was actually paid, but only the value of the services of counsel employed to defend such a suit. *Brashear* v. *Wilkins*, 56.

4. Where the judgment enjoined bears interest at ten per cent a year, the interest will not be increased on the dissolution of the injunction; but whatever may be right, will be allowed as damages. *Stafford* v. *Mead*, 142.

5. An affidavit by an agent or attorney at law, that the facts and allegations in a petition for an injunction, some of which are professedly known to him only from the information of others, are true to the best of his knowledge, is insufficient. He should have sworn to the best of his knowledge and belief. Act of 20 March, 1839, § 16. *Woodruff* v. *Payne*, 163.

6. An injunction cannot be issued to stay an execution, on grounds which might have been pleaded in defence before the judgment. *Kennard* v. *Henderson*, 165.

7. To authorize one against whom *fi. fa.* has been issued, to enjoin it, for the purpose of pleading in compensation a note of the plaintiff's in execution, the former must show that he acquired the note subsequently to the date of the judgment on which the execution was issued. *Ib.*

8. The advertisement by a sheriff of moveable property of a party, against whom a *fi. fa.* has been issued, for sale, without having been seized or taken into possession by that officer, is irregular and illegal; but where the party retains the free use of it, no injury is sustained by him. Such an irregularity will not entitle him to an injunction. *Per Curiam:* It will be time enough for him to complain, when he is disturbed in the possession of the thing. *Calderwood* v. *Prevost*, 182.

9. A motion to dissolve an injunction on the ground of the insufficiency of the allegations in the petition, is in the nature of a demurrer, and admits all the facts alleged to be true, however improbable. *Jenkins* v. *Felton*, 200.

10. Where a party gives his notes, secured by mortgage, for a certain sum, to a third person, for a title from the latter to a tract of land, in ignorance of his right, under a subrogation from another vendor, to claim a title from such third person, for a smaller sum, such an error in relation to his legal rights, will entitle him to an injunction to stay any proceedings under the mortgage notes. *Ib.*

11. The propriety of allowing any amendments to a petition for an injunction, is questionable. None should ever be allowed, unless manifestly for the promotion of justice; and an affidavit of the truth of the allegations, and of the causes that make the amendment necessary, should always be required. An amended petition should never be allowed in such a case, where delay seems to be the object. *Calderwood* v. *Trent*, 227.

12. A trivial error in the amount of the costs of a judgment, is no ground for en-

joining the execution. The injured party may have it corrected, under the order of the judge of the court which rendered the judgment, in the clerk's office, where all the records and documents necessary to enable the proper costs to be taxed, may be found. *Ib.*

13. The damages allowed by the third section of the act of 25 March, 1831, on the dissolution of an injunction, are not to be calculated on the whole amount of the debt for which the execution was issued, where it was not enjoined for the whole amount. They should be calculated on the amount enjoined. *Ib.*

14. Where the value of the property seized under a *fi. fa.* from a Parish Court, is beyond the jurisdiction of the court from which the writ was issued, an injunction may be obtained, by one claiming to be its owner, from a District Court. The circumstances of the case make it a necessary exception to the rules laid down in arts. 395, 397, 617, 629, of the Code of Practice.

McDonogh v. *Doyle*, 302.

15. The obligation of a vendor, under his warranty, to defend the title of his vendee, constitutes a sufficient interest to enable him to enjoin a sale of the property, attempted by a third person. *Bach* v. *Goodrich*, 391.

INSOLVENCY.

1. A debt due to an insolvent who has made a surrender of his property, whether placed on his schedule or not, passes by the surrender to his creditors, with all his other property; and the syndic may sue to recover it.

Dwight v. *Smith*, 32.

2. No action can be commenced or prosecuted against the syndics of an insolvent in any other court than that before which the proceedings were pending. C. P., 165, § 3. Act 20 February, 1817, § 37. The creditors are interested in contesting each other's claims, and it is only on a tableau of distribution that their validity and relative rank can be finally settled. Though it may be necessary, under art. 2080 of the Civil Code, to make the syndics parties to an action instituted against a co-obligor with the insolvent in a joint obligation, in order to obtain judgment against the latter, it does not follow that a judgment can be rendered against the syndics. *Marsh* v. *Marsh*, 45.

3. The creditors of a partnership do not lose their preference on the partnership property, by being compelled to establish their claims in the *concurso*, contradictorily with the other creditors of a partner who has made a surrender of his property. *Ib.*

4. A judgment homologating a tableau of distribution of the effects of an insolvent, is final, and has the force of *res judicata* so far as it settles the rank and privileges of the creditors; and where the tableau is complete, and states distinctly the amounts of the debts, not leaving them to be inferred from the dividend, it will be final, and have the same force as to their amounts. *Aliter*, where the tableau is cut provisional, presented in the course of the settlement of a solvent estate, the object of which was not to show the amount of the debts, but how the funds on hand were to be distributed.

Gardiner v. *Brashear*, 61.

5. Where an insolvent debtor makes a cession of his property, and it is accepted by the judge for the benefit of his creditors, it is thereby vested in them, and cannot be seized, attached, nor levied on in any manner. Act 29 March, 1826, sec. 2. The death of the ceding debtor cannot change the rights of the creditors on the property, which they may retain and sell, as they might have done before his death. C. C. 2176. The only interest which his succession can have, is in any surplus remaining after the payment of the debts; and all that the administrator has to do, is to see that the ceded property is properly administered, and to claim any surplus. Should he, in virtue of his office, or under any other pretext, illegally take possession of the property surrendered, the court before which the surrender was made, is the proper tribunal to enforce the claim of the syndic. *Lawrence* v. *Guice*, 219.

6. Where a debtor has made a *cessio bonorum*, and a stay of proceedings has been ordered, he cannot be proceeded against, either directly or indirectly. *Tyler & c.* v. *Their Creditors*, 372.

7. A partnership is dissolved by a *cessio bonorum* made by one of its members. *Ib.*

8. On the insolvency of one of the members of a partnership, his syndic has a concurrent, though not exclusive right to the administration and settlement of its affairs; but the seizure of the interest of his copartner under a *fi. fa.*, does not so divest the title of the latter, and vest it in the sheriff or the creditor, as to give to the officer, or the creditor, the right to claim to administer jointly with the syndic of the insolvent. The effect of the seizure is merely to give a privilege on the thing seized, and a right ultimately to sell it, if not arrested by some judicial order, or legal cause. *Ib.*

9. A partner having a right to sell all the moveables of the firm to obtain money for its use, or to pay its debts, may make a cession of the goods of the firm for the purpose of discharging its debts, his co-partner making no opposition. C. C. 2166. *Ib.*

10. Syndics are required by law to deposit funds received by them in some solvent bank, and to file a tableau and distribute the money as soon as practicable: and where they wilfully delay to do so, and the funds depreciate, or are lost by their neglect, or by the want of prudent foresight and observation as to the condition of the bank, they will be responsible for any loss sustained thereby. *De Gruy* v. *His Creditors*, 458.

11. In an action by a creditor to annul a sale made by a debtor, alleged to be insolvent, in fraud of his rights, the vendees may plead in compensation of plaintiff's demand, a sum alleged to be due to the insolvent, their co-defendant, though the latter have failed to plead it in time to prevent a judgment for the whole amount claimed as against him. *Mandell* v. *Stephens*, 491.

INTEREST.

1. By no device or shift can a higher rate of interest be recovered for the loan of money, than that allowed by law. *Baker* v. *Garlick*, 125.

2. Where the judgment enjoined bears interest at ten per cent a year, the interest will not be increased on the dissolution of the injunction; but whatever may be right, will be allowed as damages. *Stafford* v. *Mead*, 142.

3. A stipulation in a note given for the price of property sold on credit, that, if not paid at maturity, it shall bear the highest conventional interest from the date of the note till paid, is usurious. *Stone* v. *Tew*, 194.

4. Legal interest will be allowed from maturity, on notes given for the purchase of slaves. C. C. 2531. *Ib.*

5. A creditor of a succession for the amount of an open account, cannot recover interest at a higher rate than five per cent a year. *Gillet* v. *Rachal*, 276.

6. Though a purchaser of real estate who has given notes for the price, payable at a future day, and bearing interest from date if not punctually paid, may be authorised by the agreement of the parties to delay their payment until the erasure of a mortgage existing on the property, he will be bound to pay interest during any delay in making such erasure. *Per Curiam:* The defendant might have relieved himself from interest, by depositing the amount of the notes; but not having done so, and being in the enjoyment of the property, he is liable for the interest. He cannot enjoy, at the same time, both the price and the thing sold. C. C. 2531, 2535, 2537. *Ferraud* v. *Claiborne*. 424.

7. Where a mortgage creditor of an insolvent having obtained judgment against the syndic, causes the mortgage property to be sold, and purchases it himself at a price exceeding his claim, and re-sells it for cash, and his vendee is evicted on the ground of illegalities in the first sale, he cannot recover against the syndics interest on his debt between the time of the purchase and the eviction of his vendee. The use of the land, or of the price received from his vendee, extinguished any claim for interest during that period.

De Gruy v. *His Creditors*, 458.

INTERPRETATION.

1. In the interpretation of a written instrument, all its clauses must be construed the one by the other, giving to each the sense resulting from the entire act.

McKerall v. *McMillan*, 19

2. Where a question arises as to the quantity of land intended to be sold, and reference is made in the act of sale to the conveyance under which the vendor held, both acts will be consulted and construed together, to ascertain the true description of the thing sold. *Labiche* v. *Jahan*, 30.

3. Where the property sold is described in the act of sale as the fraction of a town lot, bounded on two sides by certain streets, and enclosed on another by a fence dividing it from another lot held separately by the vendor at the time of sale, the calls for a boundary will control the enumeration of quantity. *Ib.*

4. In the interpretation of a contract, it will not be presumed that either party intended to impose an absurd or impossible condition. It will be construed as the parties must be supposed to have understood it at the time of its execution.

Clay v. *Ballard*, 308.

5. It is a sound rule of construction never to consider laws as applicable to cases which arose previous to their passage, unless the legislature have, in express terms, declared such to be their intention.

Succession of Deyraud, 357.

6. An agreement *sous seing privé* as to the sale of land, may be referred to for the purpose of explaining any ambiguous clause of an authentic act of sale of the same property, subsequently executed by the parties, though it be declared in the latter that the previous agreement was null and void.

Lallande v. *Lee*, 514.

7. Laws *in pari materia* must be construed together, to ascertain the meaning of the legislator. *Phelps* v. *Righter*, 531.

8. Where a bond is taken under a particular law, it must be construed by it; and the casual insertion in such a bond of an additional condition, not contemplated by the legislature, will not bind the surety.

Welsh v. *Barrow*, 535.

INTERROGATORIES.

See EVIDENCE, 43, 44, 45, 46, 49, 50.

INTERVENTION,

See PLEADING, 6.

JOINT OBLIGORS.

See PLEADING 5, 9, 10, 14. SURETY, 4.

JUDGMENT.

1. A judgment in a revocatory action annuls the act attacked so far only as it affects those who sue to annul it. Those who were neither parties nor privies to the proceedings, cannot avail themselves of them.

Labauve v. *Boudreau*, 28.

2. In an action by a wife against her husband for a separation of property, a judgment was entered by consent, pronouncing the separation and settling the claims of the wife, and reciting that it is further agreed that the plaintiff shall confess judgment in favor of certain persons, not parties to the suit, for the amounts claimed by them in suits in the Parish Court of the parish, and assume to pay the same. An injunction having been sued out against a *fi. fa.* obtained by the parties in whose favor the stipulation was made: *Held*, that the clause in the judgment did not authorize the issuing of a *fi. fa.*, and that it can be viewed only as a *stipulation pour autrui*, of which, if valid, the parties in whose favor it was made can take advantage only by an action against the plaintiff. C. P. 35. *De Blanc* v. *Mouton*, 48.

3. After judgment signed, a new trial cannot be ordered, *ex officio*, by the court, in order to correct an error in the judgment. The remedy is by appeal.

Smith v. *Delahoussaye*, 50.

4. A judgment homologating a tableau of distribution of the effects of an insolvent, is final, and has the force of *res judicata* so far as it settles the rank and privileges of the creditors; and where the tableau is complete, and states distinctly the amounts of the debts, not leaving them to be inferred from the

dividend, it will be final, and have the same force as to their amounts. *Aliter*, where the tableau is but provisional, presented in the course of the settlement of a solvent estate, the object of which was not to show the amount of the debts, but how the funds on hand were to be distributed.

Gardiner v. *Brashear*, 61.

5. Where in an action by a wife for a separation of property, the petition alleges that the husband had received and applied to his own use a sum of money, of which a donation had been made to her, and that she has a legal, tacit mortgage on his property, for its reimbursement, but the prayer only asks for a judgment for the amount with interest, no judgment can be given as to her right of mortgage. *Holmes* v. *Her Husband*, 117.

6. Where a tutor, appointed by a Probate Court, sues before a District Court, the latter cannot inquire into the legality of the judgment of the former appointing him tutor. *Per Curiam:* The correctness of the judgment of the Probate Court cannot be questioned in the District Court, where it must have its effect, until set aside in some of the modes prescribed by law.

Leckie v. *Fenner*, 189.

7. Arts. 604 to 613 of the Code of Practice, authorizing actions to annul a judgment, confine them to the parties to the judgment, and restrict them to the court before which they have been previously litigating. But where a creditor seeks to annul such a judgment, the action must be brought before a court of ordinary jurisdiction. Such an action to annul a judgment for fraud and collusion, is a revocatory action, of which Probate courts are without jurisdiction. *Trichel* v. *Bordelon*, 191.

JUDICIAL PROCEEDINGS.

The act of 19 February, 1825, relative to the recording of judicial proceedings, was intended to provide more effectually for the preservation of the evidence of judicial decisions; and it is as much the duty of clerks of courts to comply with its provisions, as to perform any other official duty for which they are allowed a fixed compensation. *Matter of J. T. Mason*, 105.

JURY.

1. A defect of form in a verdict will be cured, where the party against whom it was rendered made no attempt, under the provision of art. 528 of the Code of Practice, to correct it below, nor made it a distinct ground for a new trial.

Simon v. *Brashear*, 59.

2. Where justice requires it, the verdict of a jury will be set aside, and the case remanded for a new trial. *Bailey* v. *Stevens*, 158.

3. One sued as the maker of a promissory note, has no right to a trial by jury, unless he annex to his answer praying for it, the affidavit required by the twenty-fourth section of the act of 20 March, 1839.

Kennard v. *Gustine*, 170.

4. In an action for damages for a malicious prosecution, the jury, having been charged that the defendant could only be made liable in case the prosecution

was without probable cause and malicious, brought in a sealed verdict. The foreman having informed the counsel for the defendant, that the jury had given a verdict for the plaintiff, as a matter of charity, though he and nearly all the other jurors thought there was no malice, the counsel for the defendant moved the court, previous to the opening of the verdict, that the jury be asked whether it was their intention to convict the defendant of malice. The counsel of the plaintiff opposed the motion, and his opposition was sustained. On appeal: *Held*, that the opposition was correctly sustained.

Digard v. *Michaud*, 387.

5. After a verdict has been rendered, it is not in the power of any number of the jurors nor of all of them, to deprive the party who has obtained it of any advantage resulting therefrom. No declaration, though under oath, of any member of the jury, as to the reasons which led to the verdict, can be listened to. *Ib.*
6. Where the jury have omitted to act on a reconventional demand set up by the defendant, he will be entitled to a new trial. *Welsh* v. *Barrow*, 520.
7. Where several juries have rendered verdicts in the same way, the party aggrieved may appeal without moving for any further new trial.

Marks v. *Landry*, 525.

LEVEE.

In an action by a Police Jury for the fine imposed for building a house on the levée of a river, and for the removal of the house at the expense of the defendant, plaintiffs cannot recover, where it is shown that the building was not on the levée, but on the space in the rear thereof reserved for public use, the obstruction of which is a different offence, punishable by a different penalty.

Police Jury of Jefferson v. *Eastman*, 297.

MALICIOUS PROSECUTION.

1. In an action for damages for a malicious prosecution, malice is usually, but not always implied, from the want of probable cause for the prosecution. It will not be implied where the person against whom it is charged, is a man of high reputation, of a humane disposition, and nothing induces the belief that he had any cause of displeasure which could prompt him to injure the person he had accused. *Digard* v. *Michaud*, 387.
2. The plaintiff in an action for damages for a malicious prosecution must prove the want of probable cause. There must be some positive evidence to show that the prosecution was groundless. *Ib.*
3. An action against one who had instituted a suit against plaintiffs by attachment, in which there was judgment in favor of the latter, for damages beyond the amount of the attachment bond, on the ground of the proceeding being malicious, cannot be considered as an action on the bond for an illegal attachment. It is in the nature of an action for a malicious prosecution; and in such a case malice, and the want of probable cause for the original action, are essential. Malice may be proved expressly, or be inferred from the total want of

probable cause of action; but malice alone, however great, if there was probable cause for the prosecution, is insufficient to maintain an action for damages for a malicious prosecution. *Sénécal* v. *Smith*, 418.

MINOR.

1. A married woman, under twenty-one years of age, cannot make a valid renunciation of her privileges and mortgages on the property of her husband, in favor of his creditors. Act of 15 March, 1835. *Breaux* v. *Carmouche*, 36.
2. Emancipated minors cannot, except under certain restrictions, and to a limited extent, dispose of their property, or renounce their rights. C. C. 376, 377. *Ib.*
3. Though the sale of the property of minors may be invalid from the want of the formalities prescribed by law, it will be no defence to an action against their tutor for the price, which had been received by him. The formalities prescribed for the sale of minors' property, are intended for their protection alone; the nullities resulting from the want of their observance, are relative, of which the purchaser cannot take advantage; the minors alone can oppose them. *Spencer* v. *Conrad*, 78.
4. Art. 345 of the Civil Code, which declares that "a tutor, cannot, without authority from a judge, by and with the advice of a family meeting, accept or refuse an inheritance which has descended to the minor," does not apply to a sum given to the minors by their grandmother as an advance on their share in her succession. Such a donation may be accepted by the tutor, or by either of the parents, or by any legitimate ascendant of the minors. C. C. 1533. *Ib.*
5. An action for the removal of a tutor or tutrix, cannot be prosecuted, even by the under-tutor, without authority from the Probate Judge. *Per Curiam:* The under-tutor, like any other person, must communicate to the Judge of Probates the fact which may render it necessary to remove the tutor, and the judge is to determine whether there be sufficient ground to commence an action. C. P. 1015, 1016. *Lillard* v. *Kemp*, 113.
6. Where a mother, the tutrix of her children, marries without having applied to the judge to have a family meeting called to decide whether she shall be continued as tutrix, she will, *ipso facto*, without any sentence of a court, be deprived of the tutorship; and she cannot afterwards enforce, or receive payment of debts due to the minors. C. C. 272, 2140. *Hall* v. *Parks*, 138.
7. Where a succession has been opened here, a guardian of the minor heirs, appointed in another State, cannot take out execution on a judgment for a debt due to the succession. As a succession can only be accepted for minors with the benefit of inventory, (C. C. 346,) an administrator must be appointed; and he alone can sue for, or receive debts due to it. *Ib.* *Parks* v. *Patten*, 167.
8. The tutor of the minor heirs cannot administer the succession by virtue of his office as tutor; he must be appointed administrator, and give the security required by law. *Hall* v. *Parks*, 138.
9. Where a tutor, appointed by a Probate Court, sues before a District Court, the latter cannot inquire into the legality of the judgment of the former appointing him tutor. *Per Curiam:* The correctness of the judgment of the

Probate Court cannot be questioned in the District Court, where it must have its effect, until set aside in some of the modes prescribed by law.

Leckie v. *Fenner*, 189.

10. Where one, as tutor of a minor, gives a receipt to the administrator of a succession, for a sum to which the minor was entitled as heir, for the purpose of accommodating a purchaser of real estate belonging to the succession, who is credited with the amount on his purchase, and the tutor afterwards takes, in his individual name, a mortgage on the premises to secure the amount due to his ward, with interest, he will be liable to the latter unconditionally. The transaction cannot be viewed as an investment of the funds of minor. C. C. 341. *Lowe* v. *Armant*, 236.

11. Where in an action against the maker of a note, defendant pleaded that he was a minor at the period of its execution, and plaintiff proved that he was engaged in trade at the time, and that the note was executed in relation to such trade, but adduced no evidence of his having been previously emancipated, there should be a judgment of non-suit. *Per Curiam:* The execution of the note being admitted, and the plea of minority relied on, it was incumbent on the plaintiff to bring his case within the exception of art. 379 of the Civil Code, which provides that the *emancipated* minor, who is engaged in trade, is considered of the age of majority for all acts relative to such trade; and the omission of the plaintiff to establish the facts essential to make out his case, must produce the same effect, whether such facts be set forth in his petition, or their proof be rendered necessary by the nature of the defence.

Holliday v. *Marionneaux*, 504.

MORTGAGE.

1. A married woman, under twenty-one years of age, cannot make a valid renunciation of her privileges and mortgages on the property of her husband, in favor of his creditors. Act of 15 March, 1835. *Breaux* v. *Carmouche*, 36.

2. It is not necessary to record the mortgage or lien given by law to secure the paraphernal property of the wife, in order to give it effect against third persons. *Ib.*

3. Art. 678 of the Code of Practice, which requires where land, slaves, or other objects susceptible of being mortgaged, are to be sold by the sheriff, that he shall read a certificate obtained from the Register of Mortgages in the parish where the sale is made, to show whether there exist any privileges or mortgages on the property offered for sale, contemplates such a certificate as will exhibit to bidders the situation of the property in relation to existing incumbrances, whether created by the actual owner or previously, so far as the records will enable the Register to ascertain them. C. C. 3357.

Smith v. *Moore*, 65.

4. The vendee of a purchaser at a sheriff's sale, though expressly subrogated to all the rights and privileges acquired by his vendor under the sheriff's sale, has no right of action against the Recorder of Mortgages for having given an imperfect and erroneous certificate, in consequence of which his vendor was induced to purchase property charged with incumbrances not made known at

the time of the sale. *Per Curiam:* Such an action is not a real one, following the property; nor one accruing to the purchaser at the sheriff's sale, by virtue of the sheriff's deed; but is a personal one, arising from acts preceding the sale, and which entered into the motives for the purchase. The gist of the action against the Recorder, is the error into which the purchaser was led by the false certificate; and to such an action it would, perhaps, be a good defence, that the purchaser was fully aware of the existing incumbrances, though omitted in the certificate. To make out such a defence, the Recorder would be entitled to all legal evidence, and especially to resort to the conscience of the plaintiff by interrogatories; and of these means of defence he would be deprived, by permitting an action in the name of the vendee of the purchaser, between whom and the Recorder there is no privity. *Ib.*

5. A purchaser of property subject to a mortgage, in possession, is entitled to the rights and privileges of a third possessor, though a judgment had been obtained by the mortgagee against the mortgagor, but no execution had issued before the purchaser took possession under the sale; it is only where the mortgage contains the pact *de non alienando*, that the third possessor is not entitled to notice. Though the sale were alleged to be fraudulent, a creditor of the mortgagor could not disregard it, and levey an execution, without resorting to a revocatory action. *Maskell* v. *Merriman*, 69.

6. A third possessor of property subject to a judicial mortgage, has not only a right to require regular notice, but to demand the previous discussion of other mortgaged property yet in possession of the debtor. C. P. 71. *Ib.*

7. Property specially mortgaged to secure the payment of notes given by the vendee for the price, having been sold on a twelve-month's credit, under a judgment obtained by the vendors on one of the notes, was purchased by a third person, who, a short time after, resold it to the original vendee, in consideration of his paying the twelve-months' bond. The original vendors having afterwards obtained judgment for the balance due on the notes given for the price, which was recorded subsequently to the registry of a judgment obtained against the vendee by other creditors, in a contest between the latter and the original vendors: *Held*, that the sheriff's sale divested the vendee of his title, and extinguished the mortgage of his vendors, unless it be proved that the vendee was the real purchaser at the sheriff's sale, and bid in the property through the nominal purchaser. In the latter case, the mortgage of the original vendors would not be extinguished, and the payment by the vendee, of the amount of the twelve-months' bond, would be considered as a payment on the debt to his original vendors. C. P. 685, 686, 708. *Follain* v. *Broussard*, 72.

8. A prior mortgagee cannot arrest the proceedings of subsequent mortgagees, merely on the ground of the priority of his mortgage. If the property should not sell for enough to satisfy all the mortgages prior to that of the plaintiff in the seizure, there can be no sale; if it should sell for enough, the latter has a right to proceed. *Bludworth* v. *Hunter*, 256.

9. The fruits of an immoveable, gathered or produced since it was under seizure, make a part thereof, and enure to the benefit of the person making the seizure (C. C. 457); but crops standing at the time of the sale of the property, are

considered part of the land to which they are attached, and pass to the purchaser as part of the consideration of the price. The fruits of mortgaged property are subject to the mortgage only while in the hands of the mortgagor; they cease to be so, when they accrue after its transfer to a *bona fide* purchaser and possessor. C. C. 456. *Ib.*

10. Where a mortgage contains the pact *de non alienando*, the mortgagee may proceed at once against the land, without making any demand of a third possessor of the mortgaged premises, or giving him any notice such as is required in ordinary hypothecary actions. *Pepper* v. *Dunlap*, 283.

11. A mortgage may be executed for endorsements previously made, and it will have effect as to any notes or bills given in renewal of those originally endorsed by the mortgagee; but the amount of the endorsements must be expressed in the act, that third persons may have notice. C. C. 3259, 3277.
Linton v. *Purdon*, 482.

12. Arts. 3259 and 3277 of the Civil Code are not inconsistent with each other. The former provides that a mortgage may be given for an obligation not yet in existence, while the latter requires that the amount for which it is given shall be expressed in the act. *Ib.*

NEW ORLEANS CANAL AND BANKING COMPANY.

Where a company, incorporated for the purpose of constructing a canal, are bound by their charter to keep the canal in good order, they are necessarily invested with the discretionary powers essential to the police and proper regulation of the canal and its navigation; and where the latter is impeded, or the canal injured by the use of steamers, they may be excluded. But the discretion vested in the company is not an arbitrary one; it must be exercised with proper regard to the rights of individuals, or the company will be liable in damages.
Sheldon v. *New Orleans Canal and Banking Company*, 360.

NEW ORLEANS, CITY OF.

1. The ordinances of the Council of the Second Municipality of New Orleans, of the 23d and 30th June, 1842, imposing a wharfage charge on all packages landed in or shipped from the limits of the Municipality, do not conflict with the provisions of the constitution of the United States which give Congress the power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, and declare that no tax or duty shall be laid on articles exported from any State, and that no State shall, without the consent of Congress, lay any imposts or duties on exports, except what may be absolutely necessary for executing its inspection laws.
Worsley v. *Second Municipality of New Orleans*, 324.

2. The power of special taxation in the manner pointed out by the act of 3 April, 1832, regulating the opening and improvement of the streets and public places of the city of New Orleans and its suburbs, can only be exercised by the Municipalities of New Orleans, in the cases and for the purposes provided for by that act, that is, when lands or premises are required for the purpose of opening,

extending, enlarging, straightening, or otherwise improving any street or public place. No tax can be legally assessed under that act in any other case, or for any other purpose. *Second Municipality of New Orleans* v. *McDonogh*, 408.

3. The Council of the Second Municipality of New Orleans, having authority to alter, or repeal the twelfth section of the ordinance of the City Council of the 18 March, 1817, prohibiting the establishment of any private hospital, or house for the reception of the sick, within the city, or its incorporated suburbs, may, without repealing that ordinance, grant permission to one or more individuals to erect a hospital within the limits of the city. Such a permission will be considered as a modification of the ordinance.

Bozant v. *Campbell*, 411.

NEW TRIAL.

1. After judgment signed, a new trial cannot be ordered, *ex officio*, by the court, in order to correct an error in the judgment. The remedy is by appeal.

Smith v. *Delahoussaye*, 50.

2. Where a new trial has been granted after judgment signed, the clerk cannot disregard the order, and issue execution, though the court may have erred in allowing a new trial. He is but a ministerial officer, and has no right to take upon himself to decide whether a new trial was improperly granted or refused. *Ib.*

3. Where justice requires it, the verdict of a jury will be set aside, and the case remanded for a new trial. *Bailey* v. *Stevens*, 158.

4. A motion for a new trial on the ground of newly discovered evidence, will be overruled, where the affidavit does not name the witness, nor show that he is competent to testify. *Kennard* v. *Gustine*, 170.

5. A motion for a new trial on the ground of newly discovered evidence will be overruled, where the affidavit does not state that the evidence is important or material, nor that the party had used due diligence to procure the necessary testimony. *Union Bank of Louisiana* v. *Robert*, 177.

6. The absence of counsel, where the cause of it is not shown, or his neglect to attend to a case, is no ground for a new trial. *Ib.*

7. Where the jury have omitted to act on a reconventional demand set up by the defendant, he will be entitled to a new trial. *Welsh* v. *Barrow*, 520.

8. Where several juries have rendered verdicts in the same way, the party aggrieved may appeal without moving for any further new trial.

Marks v. *Landry*, 525.

NOTARIAL ACT.

A party to a notarial act cannot prove its simulation by parol; it must be shown by a counter-letter, or by the answers of the other party to interrogatories.

Hewlett v. *Henderson*, 379.

NOTICE.

The definition of notice in the 23d paragraph of art. 3522 of the Civil Code, does not apply to notices of the transfer, or assignment of debts.

Flint v. *Franklin*, 207.

NOVATION.

1. The owners of a judgment received from their debtor certain drafts, which the receipt given for them stated, were, when paid, to be in full discharge of the judgment; it being understood that the drafts if not paid, were to be returned to the debtor, and that the former were, in that case, to be allowed to proceed with their judgment. An injunction having been obtained to stay proceedings under the judgment: *Held*, that there was no novation of the debt secured by the judgment; and that the plaintiffs in the case, who were still the owners of the judgment, having returned the drafts to the clerk's office of the court in which the judgment was rendered, to be delivered to the debtor, were entitled to execution against him. *Drew* v. *Turner*, 187.

2. Where a creditor of a succession receives from the administrator a note, signed by him in his representative capacity, for the amount of an account due by the succession, stating in a receipt at the foot of the account, that the note, when paid, will be in full therefor, the execution of the note will be considered as a mere acknowledgment of the claim, and a promise to pay at the maturity of the note, and not a novation of the debt. C. C. 1397 to 1400, 1407, 1408. *Gillet* v. *Rachal*, 276.

3. Novation is never presumed. The intention to make it must clearly result from the terms of the agreement—from a full discharge of the original debt, or from the substitution of a new debtor, with the consent of the creditor. *Ib.*

NUISANCE.

Though the hulk of a vessel, moored to the bank of a river, may obstruct its use, it cannot be destroyed by an individual, without authority of law, for the purpose of abating the nuisance. C. C. 857. *Vallette* v. *Patten*, 367.

PARTNERSHIP.

1. During the existence of the partnership, the partners may be sued in the parish in which they carry on their business, although one of them may be domiciliated in a different parish. C. P. 165, § 2. Otherwise, after the partnership has been dissolved. Each partner then becomes separately bound—in a commercial partnership, for the whole debt, and, in an ordinary one, for his proportion; and each may probably claim the privilege of being sued in his own parish. *Marsh* v. *Marsh*, 45.

2. The creditors of a partnership do not lose their preference on the partnership property, by being compelled to establish their claims in the *concurso*, contradictorily with the other creditors of a partner who has made a surrender of his property. *Ib.*

3. Where there has been a settlement of accounts between partners, and a note given by one to the other for the balance found due, on an allegation of error, the former may go into an investigation of the accounts, and show that the note was given in error; but the settlement will be presumed to be correct, until the contrary is shown by the party alleging it. Receipted accounts

embraced in such a settlement, will be admissible in evidence, subject to the right of the opposite party to show that they were erroneously allowed.

Green v. *Glasscock*, 119.

4. After the death of one of the members of a commercial partnership, the partnership property is owned in common by the survivor and the representatives of the deceased; and the interest of the representatives in the stock, or notes preceeding from its sale, cannot be alienated, or disposed of by the survivor.

Shipman v. *Hickman*, 149.

5. Where an obligation is executed in favor of a commercial firm, all the parties composing it must join in any action on it, for the debt is due to the partnership collectively, and not to one or other of the partners as creditors *in solido;* and where one of the partners is dead, his representatives must join in the action. *Ib.*

6. A partnership is dissolved by a *cessio bonorum* made by one of its members.

Tyler &c. v. *Their Creditors*, 372.

7. On the insolvency of one of the members of a partnership, his syndic has a concurrent, though not an exclusive right to the administration and settlement of its affairs; but the seizure of the interest of his copartner under a *fi. fa.*, does not so divest the title of the latter, and vest it in the sheriff or the creditor, as to give to the officer, or the creditor, the right to claim to administer jointly with the syndic of the insolvent. The effect of the seizure is merely to give a privilege on the thing seized, and a right ultimately to sell it, if not arrested by some judicial order, or legal cause. *Ib.*

8. A partner having a right to sell all the moveables of the firm to obtain money for its use, or to pay its debts, may make a cession of the goods of the firm for the purpose of discharging its debts, his copartner making no opposition. C. C. 2166. *Ib.*

9. Where a member of a partnership causes the share of his partner to be seized and sold to satisfy a debt due to him individually, and becomes the purchaser, he must be presumed to have known of the claims against the partnership, and to have purchased the property, subject to the rights of its creditors to exact the payment of the partnership debts; the latter cannot be prejudiced by any acts of the partners between themselves. C. C. 2794.

Priestley v. *Bisland*, 425.

10. The admissions of a partner, previous to the dissolution of the partnership, are evidence against his copartner; but when made after the dissolution, though in relation to a transaction commenced during its existence, and not completed when the admissions were made, they are inadmissible.

White v. *Kearney*, 495.

PAYMENT.

1. Where the receipt for money paid bears no imputation, the payment must be imputed to a debt which is due, rather than to one not yet payable. C. C. 2162.

Lubleu v. *Rutherford*, 95.

2. An heir cannot be compelled to accept the payment of his share in the succession, in depreciated notes of a bank in which the executor had deposited

the funds of the estate, where the deposit was made after the bank had suspended specie payments. *Mandeville* v. *Arnoult*, 447.

3. Where the debtors of one who has been declared a bankrupt, are aware of the fact, and in their answers to interrogatories, propounded to them as garnishees in an attachment suit, state, that they still owe the debt, without mentioning in any way the application of their creditor to be declared a bankrupt, they will be liable to the assignee of the bankrupt, though they have paid the amount of their debt to the plaintiff in the action in which they were made garnishees. *Per Curiam.* They omitted to give notice of a fact which they were bound to disclose. *Nugent* v. *Opdyke*, 453.

4. Payment of a note secured by mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party for whom he paid. The payment will extinguish the debt, and the mortgage given to secure it; and the claim for reimbursement will constitute the party who paid, an ordinary creditor of him for whose benefit the payment was made. C. C. 2156, 2157. *Nicholls* v. *His Creditors*, 476.

5. In the absence of any express agreement, a payment must be imputed to the debt which the debtor had, at the time, most interest in discharging, of those that are equally due; otherwise, to the debt which is due, though less burthensome than those not yet payable. C. C. 2159, 2162.

Follain v. *Orillion*, 506.

PLEADING.

I. *Parties to Actions.*
II. *Actions where to be brought.*
III. *Petition and Amendments thereto.*
IV. *Exceptions and Answer.*
V. *Demands in Reconvention.*
VI. *Admissions.*
VII. *Interrogatories to a Party.*
VIII. *Proceedings under the 11th section of the Act of 11 February, 1841, where there is a Conflict of Privileges.*

I. *Parties to Actions.*

1. The vendee of a purchaser at a sheriff's sale, though expressly subrogated to all the rights and privileges acquired by his vendor under the sheriff's sale, has no right of action against the Recorder of Mortgages for having given an imperfect and erroneous certificate, in consequence of which his vendor was induced to purchase property charged with incumbrances not made known at the time of the sale. *Per Curiam:* Such an action is not a real one, following the property; nor one accruing to the purchaser at the sheriff's sale, by virtue of the sheriff's deed; but is a personal one, arising from acts preceding the sale, and which entered into the motives for the purchase. The gist of the action against the Recorder, is the error into which the purchaser was

led by the false certificate; and to such an action it would, perhaps, be a good defence, that the purchaser was fully aware of the existing incumbrances, though omitted in the certificate. To make out such a defence, the Recorder would be entitled to all legal evidence, and especially to resort to the conscience of the plaintiff by interrogatories; and of these means of defence he would be deprived, by permitting an action in the name of the vendee of the purchaser, between whom and the Recorder there is no privity.

Smith v. *Moore*, 65.

2. Where the petition alleged that certain slaves claimed by the plaintiffs belonged to their ancestress at the time of her marriage, they may amend their petition by averring that the title of their ancestress was made subsequently to her marriage. Such an amendment does not change the nature of the demand. Amendments after issue joined, depend on the exercise of a sound, legal discretion, and ought to be allowed wherever the administration of justice requires it. C. P. 419. *Spencer v. Conrad*, 78.

3. An action for the removal of a tutor or tutrix, cannot be prosecuted, even by the under-tutor, without authority from the Probate Judge. *Per Curiam:* The under-tutor, like any other person, must communicate to the Judge of Probates the fact which may render it necessary to remove the tutor, and the judge is to determine whether there be sufficient ground to commence an action. C. P. 1015, 1016. *Lillard* v. *Kemp*, 112.

4. A suggestion of the death of the appellee before the commencement of the action, made by the appellant, will not be noticed, where the opposing counsel declares in open court, that he is authorized to appear for the representatives of the deceased, and waives the right to have them called upon to defend the cause. *Per Curiam:* The objection, to have any weight, should have come from them. *Stafford* v. *Mead*, 142.

5. Where an obligation is executed in favor of a commercial firm, all the parties composing it must join in any action on it, for the debt is due to the partnership collectively, and not to one or other of the partners as creditors *in solido*; and where one of the partners is dead, his representatives must join the action.

Shipman v. *Hickman*, 149.

6. After a plea in compensation and a reconventional demand, a third person, claiming to be an assignee of the draft sued on, cannot cause himself to be substituted for the original plaintiff; nor can the latter be dismissed from the cause, against the will of the defendant. But the assignee had a right to intervene in the action, for the protection of his rights. *Jones* v. *Jenkins*, 180.

7. In an action against a married woman, the authorization of the husband is implied from the fact of his joining his wife, or being joined with her in the suit; but this authorization will not be implied when both are sued, and the wife alone appears. In such a case she will not be considered as acting under his authority. But where both make default, and it does not appear that the husband refused to assist her, a judgment by default may be confirmed against her. *Stone* v. *Tew*, 193.

8. Where a debtor has made a *cessio bonorum*, and a stay of proceedings has been ordered, he cannot be proceeded against, either directly or indirectly.

Tyler &c. v. *Their Creditors*, 372.

II. *Actions where to be brought.*

9. During the existence of the partnership, the partners may be sued in the parish in which they carry on their business, although one of them may be domiciliated in a different parish. C. P. 165, § 2. Otherwise, after the partnership has been dissolved. Each partner then becomes separately bound—in a commercial partnership, for the whole debt, and, in an ordinary one, for his proportion; and each may probably claim the privilege of being sued in his own parish. *Marsh* v. *Marsh*, 45.

10. No action can be commenced or prosecuted against the syndics of an insolvent in any other court than that before which the proceedings were pending. C. P. 165, § 3. Act 20 February, 1817, § 37. The creditors are interested in contesting each other's claims, and it is only on a tableau of distribution that their validity and relative rank can be finally settled. Though it may be necessary, under art. 2080 of the Civil Code, to make the syndics parties to an action instituted against a co-obligor with the insolvent in a joint obligation, in order to obtain judgment against the latter, it does not follow that a judgment can be rendered against the syndics. *Ib.*

11. Arts. 604 to 613 of the Code of Practice, authorizing actions to annul a judgment, confine them to the parties to the judgment, and restrict them to the court before which they have been previously litigating. But where a creditor seeks to annul such a judgment, the action must be brought before a court of ordinary jurisdiction. Such an action to annul a judgment for fraud and collusion, is a revocatory action, of which probate courts are without jurisdiction. *Trichel* v. *Bordelon*, 191.

12. In an action by the representatives of the successions of the deceased members of a partnership, before a District Court, for the recovery of debts due to the partnership, evidence is inadmissible to prove claims set up by the defendants against the members of the firm individually. *Per Curiam:* Such claims are exclusively cognizable in the Probate Court, where the successions of the deceased are in course of administration. They cannot be allowed, *ex parte*, in a suit in which the creditors of the estates are not cited, and in which they cannot intervene. *Lewis* v. *Moore*, 196.

13. Where one resides alternately in different parishes, and has made no declaration, in the mode prescribed by law, as to his intention to fix his principal establishment, he may be cited in either, at the option of the party interested. C. C. 42, 43, 44, 45. C. P. 166. *Crawford* v. *Read*, 243.

14. An action of rescission, instituted against the plaintiff's vendor and the holders of notes given for the price of the property sold, is not a case of joint obligation on the part of the defendants, in which the Code requires the joint obligors to be sued together, and forming, where the co-obligors reside in different parishes, a necessary exception to the rule requiring a party to be sued before the court of his domicil. *Per Curiam:* There is no separate, independent cause of action against the holders of the notes; the relief asked against them, depends upon the success of the plaintiffs in annulling the sale. *Amis* v. *Bank of Louisiana*, 348.

15. One who has not acquired a political domicil under the statute of 7th March, 1815, may yet have such a residence in a particular parish as will exempt him from being sued out of the judicial district in which such residence has been acquired. *Ib.*

16. The acts of the 14 and 26 March, 1842, chaps. 98, 157, relative to the liquidation of banks, show the intention of the legislature to have been, that all contests relative to the liabilities of banks put in liquidation, should be cumulated before the court which pronounced the judgment putting them in liquidation. The 24th sect. of the act of 14 March, 1842, assimilates the proceedings in relation to banks in liquidation, except where otherwise provided, to those under the laws relative to the voluntary surrender of property, and thereby establishes a *concurso* in a modified form.

Dorville v. *Citizens Bank of Louisiana*, 362

III. *Petition and Amendments thereto.*

17. A general allegation of demand of payment previous to the inception of suit on a promissory note, is sufficient to authorize proof of demand at the place of payment mentioned in the note. *Barker* v. *Bernard*, 18.

18. A vendor, without a counter-letter, cannot set up his own fraud and simulation as a ground to annul an act of sale made by him. Nor can his heirs, who have no greater rights than he had. They cannot allege the turpitude of their ancestor for the purpose of enriching themselves.

Labauve v. *Boudreau*, 28.

19. Where in an action by a wife for a separation of property, the petition alleges that the husband had received and applied to his own use a sum of money, of which a donation had been made to her, and that she has a legal, tacit mortgage on his property, for its reimbursement, but the prayer only asks for a judgment for the amount with interest, no judgment can be given as to her right of mortgage. *Holmes* v. *Her Husband*, 117.

20. The propriety of allowing any amendments to a petition for an injunction, is questionable. None should ever be allowed, unless manifestly for the promotion of justice; and an affidavit of the truth of the allegations, and of the causes that make the amendments necessary, should always be required. An amended petition should never be allowed in such a case, where delay seems to be the object. *Calderwood* v. *Trent*, 227.

21. A citizen of another State can only be proceeded against in a District Court of this State, by citation personally served on him within the district, or by attachment, or by the appointment of a *curator ad hoc.*

Amis v. *Bank of Louisiana*, 348.

22. To remove a testamentary executrix, an action must be commenced by petition and citation, and the matter conducted in the usual form. C. P. 1017, 1018. *Succession of White*, 353.

23. In proceedings to remove an executor, curator, or other administrator of a succession, notice or citation to the defendant is indispensable; without it, the proceedings will be null *ab initio.* The mode of removal has not been altered by the act of 16 March, 1842, chap. 120.

Succession of White—Re-hearing, 354.

24. Simulation is of two kinds. The first, where the parties intend that no engagement shall take place; the second, where a real contract prohibited by law, is intended to be entered into, under the form and appearance of another contract. In the latter case, under an allegation of simulation, a *dation en paiement* may be proved. *Mandell* v. *Stephens*, 491.

IV. *Exceptions and Answer.*

25. An allegation in the answer of the defendant in a petitory action, that he has a title translative of property, unaccompanied with any statement as to its character or derivation, will not entitle him to be considered any thing more than a mere trespasser, against whom it is unnecessary that the plaintiff should show a title perfect in all respects, one, apparently good, sufficing.
Broughton v. *King*, 215.

26. The mere denial of the existence of any mortgage, is too general an allegation to authorize the admission of evidence of payment, imputation of payment, prescription, or the like. Payment, remission, compensation, and the like, must be specially pleaded. *Bludworth* v. *Hunter*, 256.

27. Prescription, like other exceptions, must be pleaded. It will not be noticed when relied on only in the points or argument of counsel.
Beard v. *Pritchard*, 464.

28. In an action by a creditor to annul a sale made by a debtor, alleged to be insolvent, in fraud of his rights, the vendees may plead in compensation of plaintiff's demand, a sum alleged to be due to the insolvent, their co-defendant, though the latter have failed to plead it in time to prevent a judgment for the whole amount claimed as against him. *Mandell* v. *Stephens*, 491.

29. Replications being unknown to our practice, any facts which might be pleaded in reply to the defence, may be proved on the trial.
Holliday v. *Marionneaux*, 504.

30. An allegation in an answer, "that the plaintiff's claim is neither just nor well-founded," puts the justice of the claim at issue, and indirectly denies the statements on which it is based, throwing on the plaintiff the burden of proving his allegations. *Courtebray* v. *Rils*, 511.

31. A plaintiff has no right to have an allegation stricken from the answer, which, if well founded, would destroy his action, or, if unfounded, would be rejected on the trial on the merits. C. P. 330. *Welsh* v. *Barrow*, 535.

V. *Demands in Reconvention.*

32. As a general principle, a plaintiff may discontinue his suit on the payment of costs; but he cannot, by so doing, put the defendant out of court, and defeat any legal rights the latter may have acquired, under a demand in recovention, to obtain a judgment against him. The plaintiff may abandon his claim, but the defendant must be allowed to prosecute his demand. The right of a defendant to reconvene existed under the Roman and Spanish laws, in force previous to the promulgation of the Code of Practice.
Coxe v. *Downs*, 133. *Smalley* v. *Lawrence*, 210.

33. To entitle a party to institute a demand in reconvention, it must be shown to be necessarily connected with, or incidental to the main cause of action (C. P. 375); unless the plaintiff reside out of the State, or within the State in a different parish from the defendant, when such demand may be made for any cause, though in no way connected with nor incidental to the main cause of action. Act. 20 March, 1839, § 7. *Sénécal* v. *Smith*, 418.

See *Parties to Action*, 5, *supra*.

VI. *Admissions.*

34 A motion to dissolve an injunction on the ground of the insufficiency of the allegations in the petition, is in the nature of a demurrer, and admits all the facts alleged to be true, however improbable. *Jenkins* v. *Felton*, 200.

VII. *Interrogatories to a Party.*

35. The answers of a party interrogated on facts and articles form a part of the pleadings, and either party may use them without formally introducing them in evidence. They form a part of the record, from which they cannot be withdrawn. *McKerall* v. *McMillan*, 19.

36. A party who propounds interrogatories to his opponent is entitled to categorical answers, confessing or denying the facts set forth by him. C. P. 349, 353 to 356. *Baker* v. *Garlick*, 125.

37. A defendant, interrogated as to whether she had refused to pay the note sued on, may add to her answer stating that she had so refused, the reasons which induced her to do so. A party interrogated as to a particular fact, may state other facts qualifying the answer he is called on to make, provided they be closely linked to that about which he was questioned. C. P. 353.

Ross v. *Ross*, 173.

38. A party within the verge of the court during the trial, may be called on to answer *instanter*, interrogatories, as to matters requiring no recurrence to accounts or written memoranda. *Hayden* v. *Davis*, 323.

VIII. *Proceedings under the 11th section of the Act of 11 February, 1841, where there is a Conflict of Privileges.*

39. The proceedings under the 11th section of the act of 10th February, 1841, before the court to which all the suits and claims against the property of a debtor have been transferred, where a conflict of privileges has arisen between different creditors, are in the nature of a *concurso*, in which all the parties are plaintiffs and defendants. Where a particular claim has been opposed by one creditor, it is for the benefit of all the others. The evidence introduced by an opposing creditor may be used by the rest; and they will be bound by that introduced in favor of the claim so opposed. A creditor cannot take advantage of part of the evidence of another opponent, and reject the answers to interrogatories drawn from the creditor whose claim is opposed. Each opponent may introduce further evidence, but that spread upon the record cannot be divided. *Coffin* v. *Pollard*, 300.

See Injunction.

POLICE JURY.

Decision in *Fanchonette* v. *Grangé* 5 Rob. 510, affirmed.
Fanchonette v. *Grangé*, 86.

POLICE JURY OF JEFFERSON.

Under the ordinances of the Police Jury of the parish of Jefferson, that body have no right, in their corporate capacity, to sue for a violation of their ordinance relative to obstructing the space, in the rear of the levée of the Mississippi, reserved for public use. The parish judge is empowered, on the complaint of any riparian proprietor, or other white person, to order the removal of such obstruction, and to impose the fine fixed by the ordinance on the party violating it. *Police Jury of Jefferson* v. *Eastman*, 297.

POSSESSION.

See Prescription, 5, 6.

PRESCRIPTION.

1. Partial payments on a note interrupt prescription, C. C. 3486.
Parker v. *Bernard*, 18.
2. The statement by one of the drawers of a promissory note, "that he supposed he would have to pay it, if the amount could not be got out of the succession of the other drawer," is such an acknowledgment of the debt, as will interrupt prescription. C. C. 3486. *Hays* v. *Marsh*, 26.
3. The prescription of a redhibitory action after one year from the date of the sale, does not apply where the seller knew of the vice, and neglected to declare it to the purchaser. C. C. 2512. *Milo* v. *Lynch*, 98.
4. Prescription is not interrupted by the mere filing of a petition, but by the service of process subsequently issued. *Matter of J. T. Mason*, 105.
5. The plaintiff in a petitory action may introduce evidence to support an allegation in the petition, that the only title of the defendant was derived from him, and that the latter holds under him. Such evidence is admissible to show under what pretext the defendant took possession, and to destroy the plea of prescription. If the defendant got possession under color of a title derived from the plaintiff, he cannot throw it aside and set up his possession against it, and maintain a plea of prescription; but if he did not obtain possession under it, the plaintiff cannot force the title on him, against his will.
Broughton v. *King*, 215.
6. No possession, however protracted, can confer on the occupant a title to any part of the public domain of the United States, as against the government. It may be otherwise, where the government becomes the owner, for military or other purposes, by purchase, of lands within the limits of a State, already private property. In such a case, an adverse possessor may acquire title by prescription. *Pepper* v. *Dunlap*, 283.
7. The prescription of one year does not apply to an action against the con-

signees of a ship, for damages for a failure to comply with their obligations as such. Their liability is *ex contractu*, not *ex delicto*. C. C. 2972.

Palmer v. *Smith*, 396.

8. Prescription, like other exceptions, must be pleaded. It will not be noticed, when relied on only in the points or argument of counsel.

Beard v. *Pritchard*, 464.

9. To interrupt prescription, the acknowledgment of the debt must be specific, and must apply to a particular debt. So with regard to the renunciation of a prescription already acquired, the renunciation being in the nature of the renewal of an obligation; and although it may be made tacitly, it must result from a fact giving a presumption of the relinquishment of the right acquired by the prescription, and such fact must be necessarily and strongly connected with the debt intended to be revived. *Courtebray* v. *Rils*, 511.

10. Prescription acquired by the vendee, or donee of one since deceased, may be pleaded against his succession. *Boyers* v. *Vinson*, 518.

11. Art. 1989 of the Civil Code, according to which prescription runs against the syndic, or other representative of the creditors, from the day of his appointment, cannot affect vested rights previously acquired by purchasers, or donees in whose favor the prescription was complete. *Ib.*

See *Planters' Bank of Mississippi* v. *Watson*, 267, *note.*

PRESUMPTION.

See EVIDENCE, III.

PRIVILEGE.

1. A married woman, under twenty-one years of age, cannot make a valid renunciation of her privileges and mortgages on the property of her husband, in favor of his creditors. Act of March 15, 1835.

Breaux v. *Carmouche*, 36.

2. It is not necessary to record the mortgage or lien given by law to secure the paraphernal property of the wife, in order to give it effect against third persons. *Ib.*

3. The creditors of a partnership do not lose their preference on the partnership property, by being compelled to establish their claims in the *concurso*, contradictorily with the other creditors of a partner who has made a surrender of his property. *Marsh* v. *Marsh*, 45.

4. A wife has no privilege on the moveables of her husband, for her paraphernal property. C. C. 3182. *Stafford* v. *Mead*, 142.

PROHIBITION.

A writ of prohibition will not be made perpetual, until the judge of the inferior court has had an opportunity of filing an answer. C. P. 849, 850, 851.

State v. *Judge of Fourth District*, 480.

PUBLIC LANDS OF THE UNITED STATES.

1. In an action of boundary between parties, both of whom claim under the United States, the controversy will be decided according to the laws of this State. *Sprigg* v. *Hooper*, 248.
2. One who holds a title to lands under the United States, cannot, by an *ex parte* survey, made by another claimant, or by him and a surveyor of the United States, the common grantor, be deprived of the quantity of land he was previously entitled to, without his assent. *Ib.*
3. No possession, however protracted, can confer on the occupant a title to any part of the public domain of the United States, as against the government. It may be otherwise, where the government becomes the owner, for military or other purposes, by purchase, of lands within the limits of a State, already private property. In such a case, an adverse possessor may acquire title by prescription. *Pepper* v. *Dunlap*, 283.
4. Until a patent has been issued for a portion of the public lands, the title of the United States is not divested, and the whole matter is under the control of the Land Department. *Ib.*

QUASI-CONTRACTS.

Where expensive improvements highly beneficial to commerce, have been made on the banks of a river, by the corporation of a city, under the powers conferred by its charter, though their construction, at least to the extent to which they were made, was not imposed as a duty, one, who has voluntarily paid an assessment levied by the corporation on merchandise or other articles imported into, or exported from the place, to defray the expense of their erection and maintenance, cannot recover back any amount so paid, though the city may have had no legal right to levy such assessment, or to enforce its payment. Having derived benefit from the improvements, and knowing when the amount was paid that it was in the nature of a remuneration for the use of such works, there was a natural obligation to pay, and equity forbids that the amount should be recovered. The mere right to withhold payment, does not necessarily imply a right to recover back what has been paid. If the party receiving the amount may conscientiously retain it, on account of any natural obligation on the part of the person making the payment, the latter cannot recover it. C. C. 1751, 1752, 2280, 2281.

Worsley v. *Second Municipality of New Orleans*, 324.

QUASI-OFFENCES.

1. Where a company incorporated for the purpose of constructing a canal, are bound by their charter to keep the canal in good order, they are necessarily invested with the discretionary powers essential to the police and proper regulation of the canal and its navigation; and where the latter is impeded, or the canal injured by the use of steamers, they may be excluded. But the discretion vested in the company is not an arbitrary one; it must be exercised with

proper regard to the rights of individuals, or the company will be liable in damages. *Sheldon* v. *New Orleans Canal and Banking Company*, 360.

2. Where the hulk of a vessel belonging to the plaintiffs, moored at the bank of a river, was sunk by the culpable neglect of defendants, who had attached two ships to it, and though requested to fasten them properly, and warned of the consequences, and offered the means to prevent any injury, had neglected to use the proper precautions, they will be responsible to plaintiffs for the loss occasioned by their fault. *Vallette* v. *Patton*, 367.

3. Though the hulk of a vessel, moored to the bank of a river, may obstruct its use, it cannot be destroyed by an individual, without authority of law, for the purpose of abating the nuisance. C. C. 857. *Ib.*

4. Defendant, arrested at the suit of plaintiff, deposited an amount of bank notes in the hands of the sheriff as a pledge of his appearance, and plaintiff, after judgment obtained, levied a *fi. fa.* on the notes, and requested the sheriff to sell them, which the latter refused to do. *Held*, that his refusal rendered him liable to the plaintiff for the value of the notes.
Dussin v. *Allain*, 394.

5. The administrator of a succession is responsible for any loss sustained by the estate, through his neglect. *Succession of Boudousquié*, 405.

6. There is nothing in the charter of the Union Bank which authorises the directors to prevent the alienation of the stock of the bank, together with the real estate mortgaged to secure it, by refusing the purchaser the rights and privileges of a stockholder. In case of a refusal to transfer the stock, the bank will be liable in damages; and where the stock has depreciated since the request for a transfer was made, the difference between its value at that time, and at the time of the trial, is the measure of the damages for which the bank will be liable. *Byrne* v. *Union Bank of Louisiana*, 433.

7. Where the executor suffers funds of a succession, all the debts of which had not been paid, to lie on deposit in bank for more than two years, and until a suspension of specie payments, he will be responsible to the heirs for any loss occasioned thereby, on the ground of want of reasonable care and diligence. *Mandeville* v. *Arnoult*, 447.

8. Syndics are required by law to deposit funds received by them in some solvent bank, and to file a tableau, and distribute the money as soon as practicable; and where they wilfully delay to do so, and the funds depreciate, or are lost by their neglect, or by the want of prudent foresight and observation as to the condition of the bank, they will be responsible for any loss sustained thereby. *De Gruy* v. *His Creditors*, 458.

REGISTRY.

1. Notarial acts relative to immoveable property, will be without effect as to third persons, unless duly recorded in the manner prescribed by sect 7. of the act of 24th March, 1810. *Gradenigo* v. *Wallett*, 14.

2. It is not necessary to record the mortgage or lien given by law to secure the paraphernal property of the wife, in order to give it effect against third persons.
Breaux v. *Carmouche*, 36.

3. The act of 19th February, 1825, relative to the recording of judicial proceedings, was intended to provide more effectually for the preservation of the evidence of judicial decisions; and it is as much the duty of clerks of court to comply with its provisions, as to perform any other official duty for which they are allowed a fixed compensation. *Matter of J. T. Mason*, 105.

4. Where the original protest of a bill or note was produced in evidence on the trial below, without objection, the fact that the record does not show that the protest had been recorded by the notary, pursuant to the act of 14th February, 1821, is immaterial. In the absence of any proof that it was not recorded, it will be presumed that the notary complied with the law.

Pogne v. *Hickman*, 158. *Mainer* v. *Spurlock*, 161.

RES JUDICATA.

See JUDGMENT 4.

RULE OF COURT.

Where a party wishes to show that a case was not regularly set for trial, nor the proper notice given, he must cause the rules of the court of the first instance to be certified in the record, or it will be presumed that the case was regularly tried. *McAuliffe* v. *Déstréhan*, 466.

SALE.

I. *Requisites of the Contract of Sale, and of the Proof and Interpretation thereof.*
II. *Obligations of Vendor.*
III. *Obligations of Vendee.*
IV. *Action for a Reduction of Price.*
V. *Rescission.*
VI. *Judicial, and other Public Sales.*

I. *Requisites of the Contract of Sale, and of the Proof and Interpretation thereof.*

1. Notarial acts relative to immovable property, will be without effect as to third persons, unless duly recorded in the manner prescribed by sect. 7 of the act of 24th March, 1810. *Gradenigo* v. *Wallett*, 14.

2. In the absence of any allegation of fraud or error, parol evidence is inadmissible to prove the assent of a party to an alteration, as to the quantity of land in an act of sale of real estate, made by the notary before recording it. The effect of such evidence would be, to prove something said between the parties after the completion of the act, tending to change it materially, and to restrict the title of the purchaser. C. C. 2256. *Labiche* v. *Jahan*, 30.

3. Where a question arises as to the quantity of land intended to be sold, and reference is made in the act of sale to the conveyance under which the vendor

held, both acts will be consulted and construed together, to ascertain the true description of the thing sold. *Ib.*

4. Where the property sold is described in the act of sale as the fraction of a town lot, bounded on two sides by certain streets, and enclosed on another by a fence dividing it from another lot held separately by the vendor at the time of sale, the calls for a boundary will control the enumeration of quantity. *Ib.*

5. Where slaves brought into this State from another in which they are regarded as chattels, have remained for many years in the possession of a citizen of this State, he will be presumed to be the owner of them; and a *bona fide* purchaser from him, without notice of any title in another, will be protected. Otherwise, where the purchaser had notice of the claims of a non-resident owner. *Jenkins* v. *Thenet*, 34.

6. The vendor of a movable, proved to have also an interest in the matter in dispute from being allowed by the vendees to use it occasionally for his own advantage, is not a competent witness to prove the sale and delivery of the article, in a contest between the purchaser, and a creditor, who had seized it under an execution against the witness, issued on a judgment for the price.

Webster v. *Jenkins*, 179.

7. Where a party gives his notes, secured by mortgage, for a certain sum, to a third person, for a title from the latter to a tract of land, in ignorance of his right, under a subrogation from another vendor, to claim a title from such third person, for a smaller sum, such an error in relation to his legal rights, will entitle him to an injunction to stay any proceedings under the mortgage notes. *Jenkins* v. *Felton*, 200.

8. The adjudication at an auction sale, of itself, transfers the title of the property to the purchaser. Although in such sales of real estate an act of sale is to be passed, the *procès-verbal*, or certificate of adjudication prepared by the auctioneer, is as binding on the parties as a written agreement to sell. A consent to annul such a sale can only be proved by evidence that would annul a written sale of real property. C. C. 2255, 2415, 2584 to 2588.

Freret v. *Meux*, 414.

9. An agreement *sous seing privé* as to the sale of land, may be referred to for the purpose of explaining any ambiguous clause of an authentic act of sale of the same property, subsequently executed by the parties, though it be declared in the latter that the previous agreement was null and void.

Lallande v. *Lee*, 514.

10. The delivery of immovable property is always considered as accompanying the public act which transfers it; and every obstacle which the vendor may afterwards interpose to prevent the corporeal possession of the buyer, is a trespass. C. C. 2455. *Ib.*

11. A *bona fide* purchaser acquires no right to the thing sold from a vendor, not the owner, unless the owner delivered possession to the vendor, with the intention that both the possession and the property should pass. It is only in such a case that the equity of the original owner, is not equal to that of the *bona fide* purchaser for a valuable consideration. *Marks* v. *Landry*, 525.

II. *Obligations of Vendor.*

12. Plaintiff and his brother were joint owners of an undivided tract of land. The latter having made an informal donation *mortis causa* to his wife, of one half of his share, plaintiff entered into a formal partition with the widow, who sold her portion to defendant. After her death, plaintiff, as one of her heirs received part of the price which defendant had paid for the land. In an action by plaintiff to recover the part sold to defendant: *Held*, that by accepting as heir, or co-heir, his share of the estate of defendant's vendor, plaintiff bound himself to warrant defendant's title; that the obligation is an indivisible one, so far as it repels a co-heir seeking to disturb the title of the defendant; that plaintiff cannot insist upon the error of law by which he gave effect to an informal and void donation; and that his acts have made defendant's title as valid as if he were, himself, the vendor. *Smith* v. *Elliot*, 3.

13. Where the purchaser of a tract of land knew, at the time of his purchase, that a suit would be necessary to evict the parties in possession, he cannot recover from his vendor the costs of the suit. *Nash* v. *Johnson*, 8.

14. Where the purchaser at a sheriff's sale voluntarily stipulates not to avail himself of all the rights he acquired by the sale, and permits one of the former owners to occupy a part of the land with a view to perfect his right as a pre-emptioner under the laws of the United States, and the latter, on an attempt by the purchaser to dispossess him, subsequently institutes legal proceedings to be quieted in his possession, it is not such a disturbance of the purchaser as was contemplated by the warranty, and will not authorize him to withhold payment, until security be given for the title. *Brashear* v. *Wilkins*, 56.

15. A purchaser cannot complain of a disturbance, which was the result of his own violation of his contract, and neglect in defending his rights, to the prejudice of his vendor. *Merriman* v. *Kemper*, 68.

16. One who purchases land at a sheriff's sale, with a full knowledge of the difficulties he may encounter from the claims of a third person, buys the title such as it is, and cannot suspend payment of the price, because of any disturbance resulting from the possession of the person of whose pretensions he was aware. C. C. 2535, 2598. Nor can he, until evicted of his title, claim the expenses to which he may be subjected in asserting it. C. C. 2599. C. P. 711.
Fuller v. *Harman*, 205.

17. One subrogated to all the rights of his vendor, may exercise any recourse in warranty against the party from whom the latter purchased, or any action resulting from a failure of title to the property sold; and so may one, who purchased at a sheriff's sale all the right and title of the subrogated vendee.
Pepper v. *Dunlap*, 283.

18. Where the vendors of real estate are shown to have had no title, a regular eviction, by judicial authority, is not required, to entitle the purchaser, who has paid part of the price, to relief. *Ib.*

19. Where the defects or vices of the thing sold are sufficient to entitle the purchaser to a rescission of the sale, the vendor will be answerable, under his warranty, even where such defects or vices were unknown to him. His good

faith may exempt him from damages, but not from the obligation to return the price. C. C. 2450, 2509. *Farmer* v. *Fisk*, 351.

20. The obligation of a vendor, under his warranty, to defend the title of his vendee, constitutes a sufficient interest to enable him to enjoin a sale of the property, attempted by a third person. *Bach* v. *Goodrich*, 391.

21. Art. 2535 of the Civil Code, which only authorizes the purchaser who is, or has just reason to fear that he will be disquieted in his possession, to withhold the price until he receives security, applies to a buyer in possession, who has accepted the sale, and not to one who discovers a defect or encumbrance in the title of his vendor before accepting a deed or possession. The latter may refuse to execute the act of sale until a good title is tendered to him, and must be released if his vendor is unable to give one; *aliter*, as to judicial sales. C. P. 710. *Freret* v. *Meux*, 414.

22. The mere danger of eviction will not authorize a purchaser to withhold the price of the land sold, if security or indemnity be offered by the vendor. C. C. 2535. *Lallande* v. *Lee*, 514.

23. In the absence of any adverse claimant, a purchaser will not be permitted to dispute his vendor's title, or to show its inferiority to that of another. If disquieted in his possession, or if he have reason to fear that he will be, he may require security against eviction; and, if that be furnished, he cannot withhold the price. C. C. 2535. *Barrow* v. *Wright*, 522.

III. *Obligations of Vendee.*

24. A purchaser of property, entitled to require a good title before signing the act of sale, will not be liable for the price stipulated to be paid, when the property fell greatly in value before the vendor caused the encumbrance on it to be removed. *Freret* v. *Meux*, 414.

25. Though a purchaser of real estate who has given notes for the price, payable at a future day, and bearing interest from date if not punctually paid, may be authorized by the agreement of the parties to delay their payment until the erasure of a mortgage existing on the property, he will be bound to pay interest during any delay in making such erasure. *Per Curiam:* The defendant might have relieved himself from interest, by depositing the amount of the notes; but not having done so, and being in the enjoyment of the property, he is liable for the interest. He cannot enjoy, at the same time, both the price, and the thing sold. C. C. 2531, 2535, 2537. *Ferraud* v. *Claiborne*, 424.

26. The usage, on the neglect or refusal of a purchaser to come in a reasonable time, after notice, and pay for and take the goods, for the vendor to sell them at auction, and to hold the buyer responsible for the deficiency in the amount of the sale, is a fair one; but it is not the only mode of ascertaining the damages, for a failure to comply with a contract. *White* v. *Kearney*, 495.

IV. *Action for a Reduction of Price.*

27. Art. 2522 of the Civil Code places the action *quanti minoris*, and that of redhibition, on the same footing; and a plaintiff in the former is bound to establish every fact necessary to support the latter. The purchaser may choose

between the two remedies, and in a redhibitory action the judge may decree only a reduction of price. *Farmer* v. *Fisk*, 251.

V. *Rescision.*

28. A vendor, without a counter-letter, cannot set up his own fraud and simulation as a ground to annul an act of sale made by him. Nor can his heirs, who have no greater rights than he had. They cannot allege the turpitude of their ancestor for the purpose of enriching themselves.

Labauve v. *Boudreau*, 28.

29. A judgment in a revocatory action annuls the act attacked so far only as it affects those who sue to annul it. Those who were neither parties nor privies to the proceedings, cannot avail themselves of them. *Ib.*

30. A purchaser of property subject to a mortgage, in possession, is entitled to the rights and privileges of a third possessor, though a judgment had been obtained by the mortgagee against the mortgagor, but no execution had issued, before the purchaser took possession under the sale; it is only where the mortgage contains the pact *de non alienando*, that the third possessor is not entitled to notice. Though the sale were alleged to be fraudulent, a creditor of the mortgagor could not disregard it, and levy an execution, without resorting to a revocatory action. *Maskell* v. *Merriman*, 69.

31. Though the sale of the property of minors may be invalid from the want of the formalities prescribed by law, it will be no defence to an action against their tutor for the price, which had been received by him. The formalities prescribed for the sale of minors' property, are intended for their protection alone; the nullities resulting from the want of their observance, are relative, of which the purchaser cannot take advantage; the minors alone can oppose them. *Spencer* v. *Conrad*, 78.

32. The prescription of a redhibitory action after one year from the date of the sale, does not apply where the seller knew of the vice, and neglected to declare it to the purchaser. C. C. 2512. *Milo* v. *Lynch*, 98.

33. Where a sale of slaves is annulled, at the suit of the creditors of the vendor, on the ground of fraud, the purchaser will not be responsible for their hire pending the suit. *Per Curiam:* All that is required, by art. 1972 of the Civil Code, is, that the property, or its value, shall be applied to the payment of the debts of the plaintiff. That article is silent as to the hire of the slaves, or the rent of the property in dispute. *Cécile* v. *St. Denis*, 231.

34. Where in an action to rescind the sale of a slave, it is proved that he ran away within two months after the sale, plaintiff will not be required to show that the vice existed before the sale, nor to allege or prove that the slave had been less than eight months in the State. Act 2 January, 1834, §3. It is for the defendant to allege and prove that the slave has been more than eight months in the State. *Fazende* v. *Hagan*, 306.

35. In an action of rescission by the purchaser of a slave, plaintiff must prove a tender of him to defendant. *Ib.*

36. An action of rescission, instituted against the plaintiffs' vendor and the holders of notes given for the price of the property sold, is not a case of joint

obligation on the part of the defendants, in which the Code requires the joint obligors to be sued together, and forming, where the co-obligors reside in different parishes, a necessary exception to the rule requiring a party to be sued before the court of his domicil. *Per Curiam:* There is no separate, independent cause of action against the holders of the notes; the relief asked against them, depends upon the success of the plaintiffs in annulling the sale.

Amis v. *Bank of Louisiana*, 348.

37. Where the sale of a slave, made for cash, is rescinded, the defendant cannot claim to deduct the value of his services from the price. The interest of the purchase money may be considered equivalent to the services of the slave.

Farmer v. *Fisk*, 351.

38. Where a mortgage creditor of an insolvent having obtained judgment against the syndics, causes the mortgaged property to be sold, and purchases it himself at a price exceeding his claim, and re-sells it for cash, and his vendee is evicted on the ground of illegalities in the first sale, he cannot recover against the syndics, interest on his debt between the time of the purchase and the eviction of his vendee. The use of the land, or of the price received from his vendee, extinguished any claim for interest during that period. *De Gruy* v. *His Creditors*, 458.

39. Simulation is of two kinds. The first, where the parties intend that no engagement shall take place; the second, where a real contract prohibited by law, is intended to be entered into, under the form and appearance of another contract. In the latter case, under an allegation of simulation, a *dation en paiement* may be proved. *Mandell* v. *Stephens*, 491.

40. In an action by a creditor to annul a sale made by a debtor, alleged to be insolvent, in fraud of his rights, the vendees may plead in compensation of plaintiff's demand, a sum alleged to be due to the insolvent, their co-defendant, though the latter have failed to plead it in time to prevent a judgment for the whole amount claimed as against him. *Ib.*

See *Planters Bank of Mississippi* v. *Watson*, 267, *note.*

VI. *Judicial and other Public Sales.*

41. Notices of a sheriff's sale were affixed "at the court house door, and at two other conspicuous places in the same village, in a parish of sixty or seventy miles in length, in which it was shown that there is another village, nearly as large, about eighteen miles below, and a post office about the same distance above": *Held*, that this was not a compliance with the act of 6th April, 1843, chap. 135; that the Legislature did not intend to confine the notice to a single village in an extensive parish, but to give general publicity to sheriff's sales, without incurring the expense of publication in a newspaper.

Pumphrey v. *Delahoussaye*, 42.

42. Art. 678 of the Code of Practice, which requires where land, slaves, or other objects susceptible of being mortgaged, are to be sold by the sheriff, that he shall read a certificate obtained from the Register of Mortgages in the parish where the sale is made, to show whether there exist any privileges or mortgages on the property offered for sale, contemplates such a certificate as

will exhibit to bidders the situation of the property in relation to existing incumbrances, whether created by the actual owner or previously, so far as the records will enable the Register to ascertain them. C. C. 3357.

Smith v. *Moore*, 65.

43. The vendee of a purchaser at a sheriff's sale, though expressly subrogated to all the rights and privileges acquired by his vendor under the sheriff's sale, has no right of action against the Recorder of Mortgages for having given an imperfect and erroneous certificate, in consequence of which his vendor was induced to purchase property charged with encumbrances not made known at the time of the sale. *Per Curiam:* Such an action is not a real one, following the property; nor one accruing to the purchaser at the sheriff's sale, by virtue of the sheriff's deed; but is a personal one, arising from acts preceding the sale, and which entered into the motives for the purchase. The gist of the action against the Recorder, is the error into which the purchaser was led by the false certificate; and to such an action it would, perhaps, be a good defence, that the purchaser was fully aware of the existing encumbrances, though omitted in the certificate. To make out such a defence, the Recorder would be entitled to all legal evidence, and especially to resort to the conscience of the plaintiff by interrogatories; and of these means of defence he would be deprived, by permitting an action in the name of the vendee of the purchaser, between whom and the Recorder there is no privity. *Ib.*

44. One who sets up title under a forced alienation, must show a compliance with the formalities of law. It is generally sufficient to show a judgment, execution, and sheriff's deed, to induce the presumption *omnia recte acta;* but this relates to cases in which the proceedings are against the owner himself.

Maskell v. *Merriman*, 69.

45. Property specially mortgaged to secure the payment of notes given by the vendee for the price, having been sold on a twelve months' credit, under a judgment obtained by the vendors on one of the notes, was purchased by a third person, who, a short time after, re-sold it to the original vendee, in consideration of his paying the twelve-months' bond. The original vendors having afterwards obtained judgment for the balance due on the notes given for the price, which was recorded subsequently to the registry of a judgment obtained against the vendee by other creditors, in a contest between the latter and the original vendors: *Held*, that the sheriff's sale divested the vendee of his title, and extinguished the mortgage of his vendors, unless it be proved that the vendee was the real purchaser at the sheriff's sale, and bid in the property through the nominal purchaser. In the latter case, the mortgage of the original vendors would not be extinguished, and the payment, by the vendee, of the amount of the twelve-months' bond, would be considered as a payment on the debt to his original vendors. C. P. 685, 686, 708.

Follain v. *Broussard*, 72.

46. Where a judgment has been rendered in favor of a plaintiff, the whole judgment, including the costs, is his property. He is supposed to have advanced, or is liable for the costs, and the sheriff must look to him for their payment. And where the property seized and sold for cash to satisfy the judgment, has

been purchased by the plaintiff, the sheriff has no right, on the refusal of the plaintiff to pay his costs, to resell the property. Such a sale will be void.
Kershaw v. *Delahoussaye*, 77.

47. A *fi. fa.* having been levied on a note, drawn by a third person, payable to another or bearer, as the property of the defendant in execution, in whose possession it was, the latter wrote his name on the back of the note, as he stated at the time, for the purpose of identifying it. The name of the latter was not mentioned in the description of the note in the sheriff's advertisement of its sale, nor alluded to in the deed from him to the purchaser. That officer testified, that he did not consider the defendant in execution as guarantying the payment of the note; that he sold it as the property of the latter, according to the terms of the advertisement; that the defendant in execution was not present at the sale, and gave no notice that he did not consider himself liable on it; and that, he thinks, the purchaser bought it on the faith of the endorsement of the defendant in execution. An assignee of the purchaser having pleaded the amount of the note, in compensation of a claim sued on by the defendant in execution: *Held*, that the endorsement was made only to identify the note; that the note was neither advertised nor sold as secured by the endorser's liability, but was seized and sold as his property; and that his own endorsement cannot be considered as making any part of the property on which the execution was levied. *Kennard* v. *Gustine*, 170.

48. Where one against whom a *fi. fa.* has been issued, purchases his own property at twelve-months' credit, and executes a bond for the price as required by law, the execution of the bond is a waiver of any objection which he might have urged against the sale, had it been to another. He cannot keep the property, and allege the irregularity of the sale; nor can his surety on the bond urge it. *Jones* v. *Frellsen*, 185.

49. A prior mortgagee cannot arrest the proceedings of subsequent mortgagees, merely on the ground of the priority of his mortgage. If the property should not sell for enough to satisfy all the mortgages prior to that of the plaintiff in the seizure, there can be no sale; if it should sell for enough, the latter have a right to proceed. *Bludworth* v. *Hunter*, 256.

50. The fruits of an immovable, gathered or produced since it was under seizure, make a part thereof, and enure to the benefit of the person making the seizure (C. C. 457); but crops standing at the time of the sale of the property, are considered part of the land to which they are attached, and pass to the purchaser as part of the consideration of the price. The fruits of mortgaged property are subject to the mortgage only while in the hands of the mortgagor; they cease to be so, when they accrue after its transfer to a *bona fide* purchaser and possessor. C. C. 456. *Ib.*

51. The bidder to whom property is adjudicated at an auction sale, becomes, *eo instanti*, the owner of it. C. C. 2586. C. P. 690, 695. If the conditions of sale be not complied with in ten days, the vendor may take measures for a sale *à la folle enchere*; but the failure of the vendee to comply with the conditions, does not revest the title in the vendor.
Succession of Boudousquié, 405.

52. A purchaser at an auction sale cannot be compelled to accept an encumbered title, when it is not shown that he had notice of the encumberance.

Freret v. *Meux*, 414.

53. Where a member of a partnership causes the share of his partner to be seized and sold to satisfy a debt due to him individually, and becomes the purchaser, he must be presumed to have known of the claims against the partnership, and to have purchased the property, subject to the rights of its creditors, to exact the payment of the partnership debts; the latter cannot be prejudiced by any acts of the partners between themselves. C. C. 2794.

Priestley v. *Bisland*, 425.

54. Where a note, taken in the ordinary course of business, before maturity, for full value, and without notice of any equities, is sold at a sheriff's sale, under a *fi. fa.* against the holder, the purchaser will acquire all his right, title and interest; and this, though public notice may have been given at the time of the sale, of equities existing between the original parties to the sale. Such a notice cannot prevent the purchaser from being subrogated to all the rights of the defendant in execution, nor vary those rights in the slightest degree. C. C. 2598, 2616. *Adams* v. *Avery*, 431.

55. A sheriff's sale of moveable effects, or rights and credits, is not valid, unless it has been preceded by an appraisement of the property seized, according to the rules laid down in the Code of Practice; and under those rules such property cannot be adjudicated for cash, unless it brings two-thirds of the appraisement. C. P. 671, 675, 676, 680. *Phelps* v. *Rightor*, 531.

SEQUESTRATION.

Where a third person, in possession of property against which a sequestration has been issued in a suit against another, executes what was intended and received as a sequestration bond for the delivery of the property after judgment, but binds himself to pay the amount of any judgment that may be rendered in the case, it will be considered as intended only to secure the delivery of the sequestered property; and where the judgment afterwards obtained in the suit declares that it is to be satisfied by privilege out of the proceeds of the property sequestered, the plaintiff cannot proceed at once against the parties to the bond, personally, for the amount of the judgment, before taking the steps necessary to procure the delivery of the property. He must take out execution against the defendant in the action, to be levied on the property sequestered, when, if not delivered on demand, he will be entitled to an action on the bond. This is necessary to put the obligors in default. C. P. 279, 280. C. C. 2113, 2122. If the property is not in their hands, the plaintiff must show the fact by the return on the execution; or prove that to issue an execution would be inefficient. *Welsh* v. *Barrow*, 535.

SHERIFF.

1. A sheriff is authorized to perform the duties of his office, until his successor is duly qualified, though the term for which he was appointed has expired.

So, in case of reappointment, he may continue to act under his first appointment, until duly qualified under a second. *Pumphrey* v. *Delahoussaye*, 42.

2. Defendant, arrested at the suit of plaintiff, deposited an amount of bank notes in the hands of the sheriff as a pledge for his appearance, and plaintiff, after judgment obtained, levied a *fi. fa.* on the notes, and requested the sheriff to sell them, which the latter refused to do. *Held*, that his refusal rendered him liable to the plaintiff for the value of the notes. *Dussin* v. *Allain*, 394.

3. The costs of advertising a sheriff's sale, if required to be paid in cash, must be advanced by the sheriff and charged with his costs, or he must call on the plaintiff in execution to provide him with the necessary funds. If not required to be paid in cash, the party will be presumed to have credited the sheriff who employed him, who signed the advertisements and sent them for publication, and who had a right to retain the amount of the charges out of the proceeds of the property, if sold for cash, or, if at twelve-month's credit, to refuse to transfer the bond to the plaintiff in execution until they were paid. *Haile* v. *Rils*, 509.

SHIPPING.

1. The master of a vessel is authorized, under his general powers, to make a contract of affreightment, and the owner is bound to perform any lawful agreement he may enter into, relative to the usual employment of the vessel. *Bergerot* v. *Farish*, 346.

2. Where the hulk of a vessel belonging to the plaintiffs, moored at the bank of a river, was sunk by the culpable neglect of the defendants, who had attached two ships to it, and, though requested to fasten them properly, and warned of the consequences, and offered the means to prevent any injury, had neglected to use the proper precautions, they will be responsible to plaintiffs for the loss occasioned by their fault. *Vallette* v. *Patten*, 367.

3. Though the hulk of a vessel, moored to the bank of a river, may obstruct its use, it cannot be destroyed by an individual, without authority of law, for the purpose of abating the nuisance. C. C. 857. *Ib.*

4. The prescription of one year does not apply to an action against the consignees of a ship, for damages for a failure to comply with their obligations as such. Their liability is *ex contractu*, not *ex delicto*. C. C. 2972. *Palmer* v. *Smith*, 396.

5. Certain boxes of merchandise, directed to one M., who lived in the country, were delivered by the consignees, on the arrival of the ship, to his agents, to be forwarded to him, though no bill of lading was produced. M., to whom the goods were sent, was insolvent. The bill of lading was afterwards produced by the agent of the shipper, according to the tenor of which, the goods were to be delivered to the latter; but there was no evidence that this fact was made known to the consignees, either by the captain, or the agent of the shipper, before the delivery. It was proved to be the custom, where the person to whom goods are to go is known, to forward them by the first safe opportunity, without waiting for the bill of lading, which is sometimes delayed, and sometimes never arrives. In an action by the owners of the ship, from whom the

value of the goods had been recovered in a suit by the shipper in another State, against the consignees: *Held*, that the accident by which the goods were lost, was in a great measure created by the direction put on them by the shipper, and by the tardiness of the notice to the defendants; and that the latter were, consequently, not responsible for the loss. *Ib.*

6. Where a notice, published by defendants, who were ship owners, that they would not be responsible for any jewelry shipped in their vessels unless the value be disclosed, is brought home to the plaintiff, the owners will not be responsible where the nature and value of the articles were not disclosed, and they were shipped in a manner calculated and intended to conceal their real character. The mere publication of a notice in one or more newspapers, no matter for how long a time, of an intention not to be responsible for particular articles unless their contents and value be disclosed, is not enough to release the carrier from responsibility; the notice must be brought home to the shipper. But if the principal had notice, the ignorance of his clerk, or agent who actually shipped the goods, is no excuse; and so if the agent had notice, but the principal had none, the carrier will be released. Where there is no notice, nor rule adopted, the better opinion seems to be, that the party who sends the goods is not bound to disclose their value, unless he is asked; but the carrier has the right to enquire and to have a true answer; and if he is deceived and a false answer given, he will not be responsible. If he make no enquiry, and no artifice is used to mislead him, he will be responsible for any loss, however great the value of the articles. *Baldwin* v. *Collins*, 468.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the United States.*
II. *Statutes of the State.*

I. *Statutes of the United States.*

1832, June 15. Authorizing inhabitants of Louisiana to enter back lands. *Sprigg* v. *Hooper*, 248.

II. *Statutes of the State.*

1805, February 17, §6. Incorporating City of New Orleans. *Worsley* v. *Second Municipality of New Orleans*, 324. *Second Municipality of New Orleans* v. *McDonogh*, 408. *Bozant* v. *Campbell*, 411.

1808. February 15. Police of shores of navigable rivers. *Worsley* v. *Second Municipality of New Orleans*, 324.

1810, March 24, §7. Recording of notarial acts concerning immovables. *Gardenigo* v. *Wallett*, 14.

1812, August 31, Discharging an insolvent from imprisonment. *Bozant* v. *Campbell*, 411.

1813, March 25. Police Juries. *Police Jury of Jefferson*, v. *Eastman*, 297.

——— 26. Recording of sales and other acts. *Fuller* v. *Harman*, 205.

1814, March 7, § 3. Sheriff's fees. *Haile* v. *Rils*, 509.

1816, March 7. Acquisition of residence in the State. *Amis* v. *Bank of Louisiana*, 348.

1817, January 28, § 14. Judicial sales. *Phelps* v. *Rightor*, 531.

——, February 20, § 37. Suits against an insolvent who has made a cession. *Marsh* v. *Marsh*, 45.

1818, March 13. Election of domicil as to promissory notes in favor of banks. *Union Bank of Louisiana*, v. *Smith*, 75.

1821, February 14. Recording of protests &c. of bills and notes. *Pogne* v. *Hickman*, 158. *Mainer* v. *Spurlock*, 161. *Crawford* v. *Read*, 243.

1822, March 23. Authorizing a marriage between an uncle and neice. *Bozant* v. *Campbell*, 411.

1825, February 19. Recording of judicial proceedings. *Matter of J. T. Mason*, 105.

1826, March 29, § 2. Voluntary surrender—vesting of property in creditors. *Lawrence* v. *Guice*, 219.

——, April 7, § 7. Amending Code of Practice—attachments. *Offutt* v. *Edwards*, 90.

1827, March 1, § 1. Duration of office of sheriffs, &c. *Pumphrey* v. *Delahoussaye*, 42.

——— 13, § 1. Proof of notice of protests of bills and notes. *New Orleans Gas Light and Banking Company* v. *Buie*, 110. *Hébrard* v. *Bollenhagen*, 155.

———, § 2. Notice of protest sent by mail. *New Orleans and Carrollton Rail Road Company* v. *Kerr*, 122. *Harris* v. *Alexander*, 151. *Mainer* v. *Spurlock*, 161.

1828, January 29. Authorizing the raising of a sum of money by lottery. *Bozant* v. *Campbell*, 411.

——, March 6. ——— *Ib.*

——— 17. ——— *Ib.*

——— 25. ——— *Ib.*

1830, March 16. Obstruction of levées, public places, &c. *Police Jury of Jefferson* v. *Eastman*, 297.

1831, March 25, § 3. Injunctions. *Brashear* v. *White*, 55. *Calderwood* v. *Trent*, 227.

1832, April 2. Exempting an individual from provisions of art. 122 of the Civil Code. *Bozant* v. *Campbell*, 411.

——— Charter of Union Bank of Louisiana. *Byrne* v. *Union Bank of Louisiana*, 433.

——— 3. Opening and improving streets and public places in New Orleans. *Second Municipality of New Orleans* v. *McDonogh*, 408.

1834, January 2, § 3. Sale of slaves—redhibitory actions. *New Orleans Gas Light and Banking Company* v. *Botts*, 305. *Fazendé* v. *Hagan*, 306.

——— 30. Police Jury of Jefferson. *Police Jury of Jefferson* v. *Eastman*, 297.

1835, March 27. Renunciation of rights by married women. *Breaux* v. *Carmouche*, 36.

1836, March 8. Dividing city of New Orleans into Municipalities. *Worsley* v. *Second Municipality of New Orleans*, 324. *Bozant* v. *Campbell*, 411.

1837, February 23. Authorizing the adoption of a certain child. *Bozant* v. *Campbell*, 411.

——, March 11. Authorizing the adoption of certain children. *Ib.*

——— 13. Voluntary surrender of property and settlement of successions. *New Orleans and Carrollton Rail Road Company* v. *Kerr*, 122. *Mandeville* v. *Arnoult*, 447.

1839, March 20. Amending Code of Practice: § 7, Demands in reconvention. *Coxe* v. *Downs*, 133. *Sénecal* v. *Smith*, 418;—§ 16, Oaths by agent or attorney. *Woodruff* v. *Payne*, 163;—§ 24, Trial by jury. *Kennard* v. *Gustine*, 170.

1840, March 28. Abolishing imprisonment for debt. *Waring* v. *Crawford*, 295

1841, February 10, § 11. Conflict between seizing creditors in courts in New Orleans. *Caffin* v. *Pollard*, 300.

1842, March 14. Liquidation of banks. *Dorville* v. *Citizens Bank of Louisiana*, 362.

——— 16. Amending Code of Practice—successions. *Succession of White—Re-hearing*, 354.

——— 26, § 4. Tax on property inherited by or bequeathed to non-residents. *Succession of Deyraud*, 357.

——— Relative to banks. *Dorville* v. *Citizens Bank of Louisiana*, 362.

1843, March 22, §1. Appeals. *Jones* v. *Frellsen*, 185.

——— 30. Powers of Corporation of New Orleans. *Worsley* v. *Second Municipality of New Orleans*, 324.

——, April 6. Advertisements of judicial sales and monitions. *Pumphrey* v. *Delahoussaye*, 42.

1844, March 14. Authorizing a certain married woman to become surety for her husband. *Bozant* v. *Campbell*, 411.

——— 25. Authorizing the adoption of a certain child. *Ib.*

SUBROGATION.

Payment of a note secured by mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party for whom he paid. The payment will extinguish the debt, and the mortgage given to secure it; and the claim for reimbursement will constitute the party who paid, an ordinary creditor of him for whose benefit the payment was made. C. C. 2156, 2157. *Nicholls* v. *His Creditors*, 476.

SUCCESSIONS.

I. *Of Executors, Administrators and Curators.*

II. *Claims against Successions.*

III. *Of Heirs and Legatees, and the Acceptance of Successions.*

I. *Of Executors, Administrators and Curators.*

1. Where a succession has been opened here, a guardian of the minor heirs appointed in another State, cannot take out execution on a judgment for a debt due to the succession. As a succession can only be accepted for minors with the benefit of inventory, (C. C. 346,) an administrator must be appointed; and he alone can sue for, or receive debts due to it.

Hall v. *Parks*, 138. *Parks* v. *Patten*, 167.

2. The tutor of the minor heirs cannot administer the succession by virtue of his office as tutor; he must be appointed administrator, and give the security required by law. *Hall* v. *Parks*, 138.

3. Where the administrator of a succession, of which the heirs are present, the administrator himself being the only creditor who had presented himself, permits the property to remain in the hands of the widow of the deceased, as the natural tutrix of the minor heirs, for their support, and she illegally alienates it, he will not be responsible to the minors. C. C. 268, 271, 272, 273.

Davis v. *Thompson*, 198.

4. The Court of Probates may compel an administratrix to render an account to the heirs or creditors, of whatever property has legally come into her possession as such; but where she takes possession of property not belonging to the succession, and which is claimed by another, it has no jurisdiction of any action to recover the property, nor for damages for its detention; nor can jurisdiction be given to it, indirectly, by a demand for an account.

Lawrence v. *Guice*, 219.

5. Where an insolvent debtor makes a cession of his property, and it is accepted by the judge for the benefit of his creditors, it is thereby vested in them, and cannot be seized, attached, nor levied on in any manner. Act 29 March, 1826, sec. 2. The death of the ceding debtor cannot change the rights of the creditors on the property, which they may retain and sell, as they might have done before his death. C. C. 2176. The only interest which his succession can have, is in any surplus remaining after the payment of the debts; and all that the administrator has to do, is to see that the ceded property is properly administered, and to claim any surplus. Should he, in virtue of his office, or under any other pretext, illegally take possession of the property surrendered, the court, before which the surrender was made, is the proper tribunal to enforce the claim of the syndic. *Ib.*

6. The decisions that the word *executor* or *administrator*, affixed to the name of the maker of a note or draft, are mere words of description, neither adding to, nor diminishing the personal responsibility of the party using them, and that an executor or administrator has no authority to bind the estate by notes or drafts, mean only that an executor or administrator cannot, by making or endorsing a note or draft in his official capacity, bind the estate when not originally liable for the debt, but that he will thereby render himself responsible, individually, for the amount. *Gillet* v. *Rachal*, 276.

7. The doctrine that a surety is released by an extension of time granted to the principal debtor without his consent, does not apply to the case of the sureties on the official bond of an administrator, to whom an extension of time has been

granted for the payment of a debt due by the succession. Nor can the forbearance of a creditor to sue, discharge the sureties of the administrator from any liability under their bond. *Per Curiam:* No one can be compelled to sue another; but the surety may sue his principal for indemnification in several cases, one of which is, when the latter is bound to discharge him within a certain time. C. C. 3026. The term fixed for the administration of executors, curators, &c., is one year, at the end of which the sureties might have compelled the administrator to render his accounts, and pay the debts of the estate. Having this right of action, the sureties cannot claim to be exonerated from their obligations, because of the delay of a creditor to sue. *Ib.*

8. To remove a testamentary executrix, an action must be commenced by petition and citation, and the matter conducted in the usual form. C. P. 1017 1018. *Succession of White*, 353.

9. In proceedings to remove an executor, curator, or other administrator of a succession, notice or citation to the defendant is indispensable; without it, the proceedings will be null *ab initio*. The mode of removal has not been altered by the act of 16 March, 1842, chap. 120. *Succession of White—Re-hearing*, 354.

10. Under the 5th sect. of the act of 16 March, 1842, where a testamentary executor or other administrator of a succession, shall suffer ten days to elapse after his appointment, without having qualified, or caused an inventory to be begun, the judge of Probates must, *ex officio*, notice such default, and take forthwith legal steps to notify those interested, and to make a new appointment in the same manner as in the first instance. He is not to wait for a complaint, but must notice the fact *ex officio*. This act imposes a new duty on the probate judge; but it has not relaxed any of the securities which those interested in the publicity of the proceedings are entitled to. *Ib.*

11. The administrator of a succession is responsible for any loss sustained by the estate through his neglect. *Succession of Boudousquié*, 405.

12. The executor of the will of one who was domiciliated and died in another State, deriving his powers from a Probate Court of this State, administers only on the property of the deceased situated here; and that part of the estate of the testatrix only is under the control of the courts of this State. Property belonging to the testatrix in another State descends, and must be administered under its laws. *Succession of Packwood*, 438.

13. Where the executor suffers funds of the succession, all the debts of which had not been paid, to lie on deposit in bank for more than two years, and until a suspension of specie payments, he will be responsible to the heirs for any loss occasioned thereby, on the ground of want of reasonable care and diligence. *Mandeville* v. *Arnoult*, 447.

II. *Claims against Successions.*

14. A judgment rendered by a court of the United States against a curator of a vacant succession, cannot be executed by the seizure and sale of the effects of the succession by the marshal of that court. The effects must remain in the hands of the curator, to be applied to the payment of the debts of the suc-

cession in due course of administration. The judgment can be satisfied only by presenting it for classification and payment to the Court of Probates, under the direction of which the succession is being administered. Any sale of the property of the succession, by the marshal under process from the United States court, is a nullity. *Kennard* v. *Stanbrough*, 254.

15. Where a creditor of a succession receives from the administrator a note, signed by him in his representative capacity, for the amount of an account due by the succession, stating in a receipt at the foot of the account, that the note, when paid, will be in full therefor, the execution of the note will be considered as a mere acknowledgment of the claim, and a promise to pay at the maturity of the note, and not a novation of the debt. C. C. 1397 to 1400, 1407, 1408. *Gillet* v. *Rachal*, 276.

16. A creditor of a succession for the amount of an open account, cannot recover interest at a higher rate than five per cent a year. *Ib.*

III. *Of Heirs and Legatees, and the Acceptance of Successions.*

17. Plaintiff and his brother were joint owners of an undivided tract of land. The latter having made an informal donation *mortis causa* to his wife, of one half of his share, plaintiff entered into a formal partition with the widow, who sold her portion to defendant. After her death, plaintiff, as one of her heirs, received part of the price which defendant had paid for the land. In an action by plaintiff to recover the part sold to defendant: *Held*, that by accepting as heir, or co-heir, his share of the estate of defendant's vendor, plaintiff bound himself to warrant defendant's title; that the obligation is an indivisible one, so far as it repels a co-heir seeking to disturb the title of the defendant; that plaintiff cannot insist upon the error of law by which he gave effect to an informal and void donation; and that his acts have made defendant's title as valid as if he were, himself, the vendor. *Smith* v. *Elliot*, 3.

18. The provisions of the 4th section of the act of 26 March, 1842, chap. 154, imposing a tax of ten per cent on sums, or the value of any property situated in this State, inherited by, or bequeathed to certain non-residents, are prospective, embracing only cases in which non-resident aliens have become entitled to successions opened after its promulgation. *Succession of Deyraud*, 357.

19. As a general rule personal property has properly no other *situs* than the domicil of the owner, and its disposition or transmission, by contract, or inheritance, depends upon the law of the owner's domicil, saving the rights acquired by creditors by attachment, or otherwise, before delivery or notice. This is especially true of debts which follow the person of the owner or creditor. *Succession of Packwood*, 438.

20. An heir cannot be compelled to accept the payment of his share in the succession, in depreciated notes of a bank in which the executor had deposited the funds of the estate, where the deposit was made after the bank had suspended specie payments. *Mandeville* v. *Arnoult*, 447.

SURETY.

1. Where a party binds himself to become the surety of a third person on his

obligation to plaintiffs, the latter may enforce the obligation, though previously ignorant of the existence of any such contract. C. C. 1884. C. P. 35.
McKerall v. *McMillan*, 19.

2. One bound as surety on the twelve-months' bond upon which a *fieri facias* was issued, is not disqualified from becoming surety in an injunction bond to arrest its execution. *Pumphrey* v. *Delahoussaye*, 42.

3. A surety in a twelve-months' bond, bound *in solido* with the defendant, cannot require the plaintiff to discuss the property of the principal debtor before proceeding against him. *Dancy* v. *Delahoussaye*, 45.

4. Where in an action on a joint note, it is shown that defendant signed it as surety, he will be liable for the whole amount, though on the face of the instrument, as a joint debtor, responsible only for half. *Butler* v. *Ford*, 112.

5. Where an action is instituted against a party for the amount of a note, against any liability for which certain persons had bound themselves to guaranty him, and, there being no defence, the party sued paid the debt and costs, he will be entitled to recover of the party bound to him, the amount so paid, including the expenses to which he was subjected by the failure to save him harmless; and as to the costs, it will be presumed that the officers of the court did not charge more than was legally due. *Wright* v. *Sewall*, 128.

6. A surety is not discharged by forbearance, or delay in suing his principal. It is only when the creditor, by giving time to the debtor, deprives the surety of the means of insisting on immediate payment, in case he pays the debt and is subrogated to the rights of the creditor, that the surety is discharged.
Warfield v. *Ludewig*, 240.

7. The doctrine that a surety is released by an extension of time granted to the principal debtor without his consent, does not apply to the case of the sureties on the official bond of an administrator, to whom an extension of time has been granted for the payment of a debt due by the succession. Nor can the forbearance of a creditor to sue, discharge the sureties of the administrator from any liability under their bond. *Per Curiam:* No one can be compelled to sue another; but the surety may sue his principal for indemnification in several cases, one of which is, when the latter is bound to discharge him within a certain time. C. C. 3026. The term fixed for the administration of executors, curators, &c., is one year, at the end of which the sureties might have compelled the administrator to render his accounts, and pay the debts of the estate. Having this right of action, the sureties cannot claim to be exonerated from their obligations, because of the delay of a creditor to sue.
Gillet v. *Rachal*, 276.

8. Where a bond is taken under a particular law, it must be construed by it; and the casual insertion in such a bond of an additional condition, not contemplated by the legislature, will not bind the surety. *Welsh* v. *Barrow*, 535.

SURVEY.

One who holds a title to lands under the United States, cannot, by an *ex parte* survey, made by another claimant, or by him and a surveyor of the United States, the common grantor, be deprived of the quantity of land he was previously entitled to, without his assent. *Sprigg* v. *Hooper*, 248.

TAX.

1. No appeal lies to the Supreme Court where the amount in dispute does not exceed three hundred dollars. The value of property seized by a sheriff to pay taxes, the sale of which was enjoined by plaintiff, cannot give jurisdiction, where the amount of taxes due is less than three hundred dollars.

Marsh v. *Briant*, 7.

2. The provisions of the 4th section of the act of 26 March, 1842, chap. 154, imposing a tax of ten per cent on sums, or the value of any property situated in this State, inherited by, or bequeathed to certain non-residents, are prospective, embracing only cases in which non-resident aliens have become entitled to successions opened after its promulgation. *Succession of Deyraud*, 357.

3. The power of special taxation in the manner pointed out by the act of 3 April, 1832, regulating the opening and improvement of the streets and public places of the city of New Orleans and its suburbs, can only be exercised by the Municipalities of New Orleans, in the cases and for the purposes provided for by that act, that is, when lands or premises are required for the purpose of opening, extending, enlarging, straightening, or otherwise improving any street or public place. No tax can be legally assessed under that act in any other case, or for any other purpose.

Second Municipality of New Orleans v. *McDonogh*, 408.

See CONSTITUTION, I.

TUTOR.

See MINOR.

UNDERTAKER.

In an action against an architect or builder, under art. 2733 of the Civil Code, for damages on account of the badness of the materials or work in a house built by contract, plaintiff must establish that the bad condition of the building resulted from the character of the materials or workmanship. Under the Code Napoleon, art. 1792, the undertaker is liable where the building cracks, or falls in consequence of a defect in the soil on which it was erected. *Aliter*, under the Civil Code of this State. *Fremont* v. *Harris*, 23.

UNION BANK OF LOUISIANA.

1. The provisions of the 8th section of the act of 2 April, 1832, incorporating the Union Bank of Louisiana, as to the mortgages to be given by the subscribers to the stock of the bank, relate to the taking of the mortgage in the first instance, and not to any subsequent transfers of the stock thus secured.

Byrne v. *Union Bank of Louisiana*, 433.

2. The provisions of sect. 24 of the same act, on the subject of the reduction of the number of shares of stock where the security offered is insufficient, refer to the first steps required in order to become a stock-holder. Nothing in that act authorizes a reduction of the number of shares of stock, where the property first offered, and accepted to secure the whole, becomes less valuable. *Ib.*

3. The clause in the 29th section of the same act, which declares that, "whenever application shall be made by a stockholder to transfer his stock and be discharged, such transfer and discharge may take place upon the new stockholder's furnishing mortgage to the satisfaction of at least a majority of all the directors," applies only where a stockholder, having sold his stock alone, retaining the immovable mortgaged to secure it, applies to have his property released from the mortgage, on the purchaser of the stock offering other property, of sufficient value, to be mortgaged in lieu of it. *Ib.*

4. There is nothing in the charter of the Union Bank which authorizes the directors to prevent the alienation of the stock of the bank, together with the real estate mortgaged to secure it, by refusing the purchaser the rights and privileges of a stockholder. In case of a refusal to transfer the stock, the bank will be liable in damages; and where the stock has depreciated since the request for a transfer was made, the difference between its value at that time, and at the time of the trial, is the measure of the damages for which the bank will be liable. *Ib.*

VERDICT.

See JURY.

WARRANTY.

See SALE, II.

WILL.

See DONATIONS MORTIS CAUSA.

END OF VOLUME IX.